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**THE PREEMPTIVE USE OF FORCE:  
ANALYSIS AND DECISIONMAKING**

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## **The Preemptive Use of Force: Analysis and Decisionmaking**

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## **The Preemptive Use of Force: Analysis and Decisionmaking**

The proliferation of weapons of mass destruction, high yield conventional explosives and information warfare technology increasingly threatens American lives, national security and economic infrastructure. The scale of destructive potential which these threats engender requires decisionmakers to search for other policy options beyond diplomacy and after-the-fact reprisals. U.S. leaders must consider military preemption as a viable, sometimes necessary, method of intervention to prevent unacceptable loss of life or damage to essential institutions.

Preemption is saturated with meaning, and yet most can't agree on what it really is. This paper defines preemption as *the prevention of significant destructive acts or capabilities by potential adversaries through the use of convincing and/or coercive measures*. This paper acknowledges other forms of coercive preemption; however this paper focuses analysis to the use of force in preemptive action.

Preemption will increasingly face the decisionmaker as an option. Any examination of preemption must be undertaken within the “landscape” of key policy variables which govern both the immediate prospect for success and the long term consequences, both intentional and unintentional. Key variables considered in this paper are military issues, national and foreign policy issues, legal issues, and ethical and moral issues. The intended outcome of the paper is to provide a framework which should

stimulate debate about what America should do when the consequences of inaction are intolerable.

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## Executive Summary

*The proliferation of weapons of mass destruction, high yield conventional explosives and information warfare technology increasingly threatens American lives, national security and economic infrastructure. The scale of destructive potential which these threats engender requires decisionmakers to search for other policy options beyond diplomacy and after-the-fact reprisals. U.S. leaders must consider military preemption as a viable, sometimes necessary, method of intervention to prevent unacceptable loss of life or damage to essential institutions.*

### I. Why Preemption ?

The debate within the Clinton administration during Spring 1996 over what to do about the ongoing construction of a Libyan underground chemical plant at Tarhunah kept returning to the same basic question: how to keep Tarhunah and its potential deadly products from threatening the United States and its interests? Preemption--that meaningful and value-packed word that excites journalists and sends politicians scrambling for cover-- was a clear policy option, according to the Secretary of Defense. Elsewhere in the world, the threat of nuclear leakage -- weapons, fissile material, and the expertise that makes it all work -- was increasing. If not enough, a series of terrorist incidents -- conventional bombs that destroyed buildings and killed Americans -- reminded all of the recurring threat from that quarter. As in Tarhunah, preemption was a policy option to address our nuclear leakage and terrorist problems.

“Preemption” is saturated with meaning, and yet most can’t agree on what it really is. We define preemption as *the prevention of significant destructive acts or capabilities*

*by potential adversaries through the use of convincing and/or coercive measures.* While acknowledging other forms of coercive preemption, we concentrate our analysis on the use of force in preemptive action.

Why is preemption important now? Since the end of the bipolar balance of power and the rise of the US as the world's sole superpower, America looms increasingly as a target -- exposed worldwide, vulnerable abroad and at home. With the proliferation of weapons of mass destruction (WMD), and conventional large-scale bombs as well as information warfare capabilities either in or soon to be in the hands of rogue states, terrorist groups, and transnational organized criminals, the US is approaching a policy crossroads. The death, destruction, and dislocation that these actors can bring upon America is likely to be so massive, so debilitating, that the act cannot be allowed to occur if there is a possibility of preventing it. And even as we remain acutely vulnerable, new information processing, possibilities for improved intelligence, and strategic strike capabilities make preemption more feasible than ever before.

*We believe preemption will increasingly face the decisionmaker as an option.*

Any examination of preemption must be undertaken within the "landscape" of key policy variables which govern both the immediate prospect for success and the long term consequences, both intentional and unintentional. Key variables considered in our study are military issues, national and foreign policy issues, legal issues, and ethical and moral issues. We provide a framework which we hope will stimulate debate about what America should do when the consequences of inaction are intolerable.

## **II. Key Findings for Hard Choices**

*Decisionmakers must consider the variables of preemption, but this is neither a checklist for success nor a recipe for action. The key variables here are the primary decision factors and aspects, which when applied to a specific scenario in a systemic way, aid the decisionmaker in selecting or rejecting preemption as a viable course of action. In any case, the decision to preempt is made specifically, with some variables outweighing others, depending on circumstances. We do believe decisionmakers and staff should think through every variable and its consequences, both near and long term. As a way to analyze a prospective course of action, we recommend our key findings:*

### **--A. Military Issues--**

- In preemption, decisionmakers face a dilemma: often the most feasible time militarily to preempt is early, before the threat has been weaponized or placed. At this stage, it is often most difficult to justify, and so is far less feasible ethically, legally, and politically. Once a threat is imminent, however, preemption is far easier to justify, but is often militarily much more difficult to actually do. Timing is critical. Decisionmakers must push hard to make preemption decisions as early as politically possible.
- Preemption can be a powerful deterrent. An ambiguous policy may be as effective as a declaratory policy, because adversaries pay less attention to what we publicly say and far more attention to what they believe we will do. Threatened preemption may also be effective, especially if a previous successful preemptive operation is publicly known.
- The capability to detect and act will often depend on civil agencies and law enforcement working hand-in-hand with the military. The threat could be a terrorist

group armed with a rogue state-supplied weapon built with fissile (or chemical or biological) material bought or stolen from a nation-state by a transnational crime organization. Effective and efficient preemptive action may require legislative action to support an optimum force mix and capability.

**--B. National and Foreign Policy Issues--**

- *Americans will not tolerate the preventable deaths of U.S. military or civilian personnel at home or overseas.* Public and Congressional reactions to the 1996 Khobar tower bombing demonstrated that “ongoing negotiations” is not an acceptable excuse for failure to take preventative action. While U.S. preemption may stimulate opposition both nationally and internationally, the effect will be ameliorated if the action is narrow in scope and directed against a clear threat which cannot be deterred by other means. A well-constructed framework for decisionmaking will reduce the possibility of inappropriate or unwarranted use of force when other effective means are available.
- We do not advocate a strictly realist foreign policy, but we urge decisionmakers to recognize that specific circumstances may require the U.S. to forego exploration of every diplomatic avenue. The diplomatic tools which have served the U.S. well since World War II may be ineffective in deterring these unconventional threats to our security. When preemption is contemplated, the concerns of allies, friendly regional states and potential adversaries must be considered and steps should be taken to ameliorate any negative impact.

### **--C. Legal Issues--**

- Preemption can be legal.
- Existing legal doctrine uses the term anticipatory self defense. The basis of self defense is codified in United Nations Article 51 which authorizes self defense when an armed attack occurs. The triggering requirement of an armed attack--in a world of proliferated WMD--is no longer reasonable when the resulting destruction would be unbearable.
- Article 51 characterizes individual or collective self defense as an inherent right, drawn from customary international law.
- Reverting to customary international law, the justification of preemption must be based on objective facts that a reasonable person would believe to exist at that time. Preemption must be reasonable and proportional commensurate to the threat.
- Customary international law is in transition and the United States should advocate redefinition of the legal standard to reflect contemporary reality.

### **--D. Ethical and Moral Issues--**

- Preemption is ethically and morally defensible.
- Consideration of the ethical dimensions of preemption is necessary because the use of force is central to the subject of ethics, and politics is an extension of ethics.
- The decision to preempt probably would not center primarily on its ethical attributes, but the consequences of preemption certainly will be subject to ethical treatment.

- Effective ethical justification of a particular preemptive policy likely will not hinge on whether actions stemming from that policy constitute proper ethical behavior *per se*, but internationally on whether the justifying ethical argument successfully satisfies legal stipulations for “self defense,” and domestically on concise articulation of the risk posed by the threat, versus the consequences of not acting.
- Sufficient ethical justification of preemption will depend on how well supporting ethical arguments flow from consistent domestic and foreign understanding of national purpose illuminated by concise statements of national interest.
- Moral thinking concerning a preemption policy can be shaped by policy advocates.

### **III. Summary Judgments**

⇒ Specific, accurate, and timely intelligence is a critical precursor--an enabler and a catalyst--for preemption. Intelligence sharing with non-traditional domestic and international partners may be necessary. Intelligence assets must focus on capabilities and intentions of potential adversaries, and on their opportunity to carry out intentions. The convergence in time and space of an adversary’s capability, intention, past history, opportunity and current actions are key to the decision to preempt.

(These five critical intelligence insights bear directly and decisively on the key decision variables. Without these, the possibilities for moral and legal justification, as well as political and military feasibility, are tenuous).

⇒ A deliberately ambiguous policy that neither rejects nor recommends preemption may be best. To our potential opponents, what we do is far more important than what we say. For the American public and the rest of the world, what we say is important.

- ⇒ Preemption may have significant deterrent value, especially after a rogue or terrorist has once been preempted. However, it may drive a determined adversary to extreme measures of retaliation and reprisal. These consequences could be worse than the original threat that was preempted.
- ⇒ Paradoxically, while preemptive actions may eliminate immediate threats, they may also cause the adversary to go underground, figuratively and literally, thereby masking future activities from detection, and making future interdictive efforts much more difficult. Another form of this lateral displacement would be for a rogue state to move its WMD production facilities completely out of its own territory and into that of another country. Alternatively, the adversary could escalate vertically, such as to consider other methods of destruction (such as moving from underground chemical plants to biological weapons manufactured in a city center). The impact of this “preemption paradox” is that decisionmakers must have a clear understanding of their objectives, and of what constitutes success: in some cases, preemption serves only to delay or prolong crisis, in favor of “buying time” to seek alternative solutions.
- ⇒ In the end, America must act in its citizen’s own interests -- the national interest. Current legal and political prescriptions often conflict with the national interest and are inadequate in today’s environment. American policy cannot be held hostage to an absolute moral or legal geometry. That said, our actions will be judged in light of some moral and legal consensus. The U.S. must take the lead to remove the existing inadequacies and build a common consensus for moral and legal behavior in today’s world.

In the international arena as well as nationally, the nation's leaders will be called upon to defend their actions, intentions, and the consequences thereof. Policy makers are accountable to those they serve to act in their best interests, even if those actions may be deeply controversial. If there are obstacles to adequate defense of those positions, then leaders should take action now to eliminate them. One likely obstacle to these factors is lack of consensus, be it international or domestic. **The path to gaining consensus starts with a systematic, purposeful, and open debate.**

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# 1

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## **Thinking About the Unthinkable: America and Preemption**

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### **The Decisionmaker's Dilemma**

The Clinton administration faced a tough national security decision in Spring 1996. Libya was again constructing a chemical weapons factory, much as it did in the late 1980s at Rabta. That facility produced at least 100 metric tons of nerve and blister agents during three years of operation. The new plant, built underground near Tarhunah, loomed as a dangerous escalation in the decades-long confrontation between Libya's incendiary leader, Colonel Muammar Qadhafi, and United States interests.<sup>1</sup>

Qadhafi had long before established himself and his regime as a radical state, with a history of regional destabilization, support for international terrorism, and state-sponsored military use of chemical weapons. American attempts to deter and ultimately retaliate against Libya's most flagrant international transgressions were inconclusive. The strongest riposte to Qadhafi to date was the U.S. bombing of Benghazi and Tripoli in 1986, in response to the bombing of a Berlin discotheque frequented by American soldiers. The destruction in 1988 of Pan American Flight 103 over Lockerbie, Scotland, killing all 259 people aboard as well as 11 on the ground was the eventual Libyan response.<sup>2</sup> Reprisal was met by reprisal.

Libya was clearly no novice in the production and use of chemical weapons. It used chemical weapons against Chadian troops in 1987.<sup>3</sup> Its plant in Rabta was characterized by then Director of Central Intelligence William H. Webster as the largest chemical weapons plant in the world.<sup>4</sup> After extensive U.S. diplomatic and economic coercion, including clear threats of military preemption by the Reagan administration, Libya apparently faked a fire at Rabta in 1990, and declared the plant destroyed.

To replace the Rabta facility, Libya began in 1991 construction of a huge, *underground* complex. Built in a mountainous region 60 kilometers southeast of Tripoli, the Tarhunah plant was described in 1996 congressional testimony by then Director of Central Intelligence John Deutsch as the world's largest underground chemical weapons plant.<sup>5</sup> Designed with its earlier Rabta experience in mind, Tarhunah appeared virtually impregnable. Built under 100 feet of sandstone and reinforced concrete and accessed by lengthy underground tunnels with "switchbacks," the plant apparently could withstand both bunker-buster bombs of the GBU-28 variety as well as cruise missiles.<sup>6</sup>

The dilemma for the Clinton administration in 1996 was much the same as that posed to the Reagan administration by the Rabta plant almost a decade earlier. *What to do about a massive chemical weapons facility possessed by Libya?* No less a rogue state or adversary of the United States in 1996 than it was in 1988, Libyan intentions were highly suspect.

## Overview of the Study

This is an analysis of preemption, and its potential role in national security affairs. For purposes of our analysis, preemption is: *the prevention of significant destructive acts or capabilities by potential adversaries through the use of convincing or coercive measures.* For most readers, "preemption" connotes use of destructive military force of some variety. While this meaning is encompassed by this definition, the definition does not dislodge other non-forceful convincing or coercive measures. Our study, however, while acknowledging other forms of coercive preemption, focuses in the main on the use of force.

Most national security decisionmakers are uncomfortable with the subject of preemption, and for good reason. Preemption is a highly controversial topic, and its history in modern international affairs is not widely known. Though admittedly used infrequently, it has been used more than most know. Appendix 1 at page 107 presents a brief issue history of preemptive actions or plans used during and since World War II, and objective synopses of the outcomes. What can we learn from these?

First, and perhaps most importantly, it is apparent that preemptive actions were triggered by perceptions that a threatening situation constituting unacceptable risk was developing, and that the situation was time-dominated. That is, there was a relatively narrow window of opportunity for action to reduce or eliminate the immediate risk, and actions beyond that window would, for a variety of reasons, be unfeasible. Second, most (but not all) of the historical examples occurred within the context of a larger armed conflict. Third, in every example, destructive military force was the means for risk

reduction. Finally, each case represents preemption as a nuclear counter-proliferation measure.

We propose that risks similar to those detailed in the issue history exist today or may exist in the near future outside the context of recognized or declared conflicts, and likewise that there will be narrow windows of opportunity to act before the situation is untenable. We also believe that the contemporary threat has expanded well beyond just nuclear weapons to a variety of Weapons of Mass Destruction (WMD), large yield conventional explosives, and perhaps even potentially devastating information or cyber warfare assaults. Examples of current threats include the 1993 U.S. World Trade Center bombing, and the 1995 gassing of the Tokyo subway system by Aum Shinrikyo. These two examples illustrate clearly that the world we lived in yesterday is not at all the same as the one we live in today.

Changes to long-standing historical principles of order in the international system are emerging in nearly every facet of international relations. As these changes emerge, they challenge the traditional ways nations relate to one another, and how they relate to non-state institutions and actors. In one sense, this is not a new phenomenon. Through the ages principles of order have changed to keep pace with and remain relevant to transformations of international order itself. But in another sense, contemporary change is radically different than that which has occurred at any time in previous history. Today's advanced technologies -- some very dangerous -- coupled with radical confrontational ideologies, widely available sophisticated global communications, and evolving international principles of order, combine to threaten the international community in ways not previously possible.

Our study proposes that these conditions present an extremely threatening scenario for the United States, one in which threats to vital interests may be so great in some cases as to require their elimination with some form of preemptive action. As we examine this issue, we analyze four key variables which must be considered by decisionmakers who decide whether to act or not on the nation's behalf. Those key variables are: military issues; national and foreign policy issues; legal issues; and ethical and moral issues.

Our study does not necessarily advocate or discourage adoption of a specific preemption policy, though by merely raising the issue it is obvious we believe the subject warrants serious consideration. Rather we attempt to focus on and dissect the key decisions in an effort to promote clear and orderly thinking on the most important components of a potential preemption policy.

Critical to our analysis that follows is a clear understanding that the scope of preemptive actions contemplated is narrowly bounded. First, recognizing that both potential threats and our perception of their urgency may change over time, preemptive action would be considered to defend only vital national interests as defined in the President's "National Security Strategy." Current vital interests include: defense of U.S. territory, citizens, allies and our economic well being.<sup>7</sup> Second, the action taken would focus on eliminating or deterring the immediate threat and not on deposing a threatening head of state or destroying his military capability. Within our meaning, preemption is a specific action directed against a discrete target. In other words, the preemptive action contemplated would not include:

- A non-discrete first strike against the military forces in general of a sovereign state which may be developing the capability to threaten U.S. vital national interests.
- Intervention directed at the authority structure of a sovereign state.
- Deterrent strikes directed against collateral targets in the guise of anticipatory self defense.

Given that intelligence sources reveal an event or a chain of events which threaten a vital national interest, thus providing strategic warning, the preemptive action contemplated would be a discrete attack on an essential link of that chain to eliminate or significantly defer the threat. While we focus on the use of force in our study, the preemptive attack itself need not include the use of military force. For example, if the threat is a non-lethal but significant threat to U.S. economic infrastructure, the preemption may be a technical action which detects and counters the threat.

Preemption has been discussed (or at least not ruled out) in several other studies and official policy documents, but in every case the discussion included prerequisites which effectively eliminated preemption as a viable option.<sup>8</sup> We do not attempt to discount or discourage other preventive mechanisms to counter threats to U.S. vital national interests. We do believe that preemptive action should be considered a viable option, and not only as the last resort.

We use the following method to examine preemptive use of force and decisionmaking. First, we look at the changing world environment, then move to examining our key variables. It is important to keep in mind that, while the chapters separate the decisionmaking variables for ease in reading and argument, we believe the

variables to be linked in such a way that impact on one has an effect on others. Before summarizing with key judgments, we illustrate this linkage and our framework by revisiting our case study.

### **Change and Risk: Why Preemption Now?**

Why is preemptive defense important now? Since the end of the bipolar balance of power and the rise of the US as the world's sole superpower, America looms increasingly as a target -- exposed worldwide, vulnerable abroad and at home. With WMD, conventional large-scale bombs, and information warfare capabilities either in or soon to be in the hands of terrorist groups, transnational organized criminals, and rogue states, the US is approaching a policy crossroads. The large scale death, destruction, and dislocation that these actors can bring upon America are likely to be so politically and morally damaging that the act cannot be allowed to occur if there is a possibility of preventing it. And even as we remain acutely vulnerable, new information processing, intelligence, and strike capabilities make preemptive defense more feasible than ever before.<sup>9</sup>

We believe there are three causes for America's increased vulnerability and thus a renewed need to address preemption -- and to do so in a systematic way. The causes are: new adversary weapons and capabilities; new and old state and non-state actors willing to confront the United States in selective and often asymmetric fashion; and a general collapse in traditional controls, all of which increase risk and exposure. We also believe that new friendly capabilities, technologies, and public acknowledgment of the threat

increase the feasibility of preemption and underscore the need for an objective framework to analyze it as a policy option.

### New Weapons and Capabilities of War

WMD have long fascinated those who make their living analyzing rogue states and terrorists. Iraq's large-scale and overt use in the 1980s of mustard and nerve gas against Iranian troops and the Kurds demonstrated that nation-states could use chemicals with only mild rebuke from the west, and indeed technical assistance from some major powers. Despite the technical difficulties of developing a homegrown nuclear device or growing a resilient and powerful biological capability, many analysts predicted that it was only a matter of time before terrorists actually would get and use some form of WMD.<sup>10</sup> On March 20, 1995, their fears were realized. A Japanese cult group with over 10,000 members attacked Tokyo's subway with Sarin nerve gas, killing 11 and causing some 5,000 causalities.<sup>11</sup>

Biological weapons remain an unproved but potentially immense threat. The discovery of Iraq's massive biological warfare program by UN inspectors after the Gulf War helped focus international concern on other biological weapons proliferators, including North Korea, Iran, Syria, and Libya. As in the case of chemical weapons, states who desire biological agents are able either to develop their own or purchase the basic building blocks of a capability on the international market -- both the result of the dual-use technology behind biological agents. The US Congress Office of Technology Assessment, speaking about offensive biological agents, noted that "...the capacity to engage in illegal

military activities is inherent in certain nominally civilian facilities.”<sup>12</sup> The chilling possibility of a rogue state or group weaponizing biological agents for use in terror or political extortion is probably more likely than ever, given that the biotechnology revolution has made it easier to develop and weaponize new biological organisms, with far more lethal potential than the traditional biological warfare agents of the past.<sup>13</sup>

The collapse of the Soviet Union dramatically decreased the controls on both nuclear weapons and fissile material within the former Soviet empire. The dangers of nuclear leakage -- that one or more of the 15-25,000 nuclear devices, 800-1200 tons of highly enriched Uranium, or the 200 tons of Plutonium-239 might get into the wrong hands -- are increasingly the subject of government and public debate. As the U.S. and others debate how much resources we should devote to the problem, fissile material is finding its way to the international market. There have been some 200-300 reported attempts to sell nuclear materials in Germany alone over the past few years. As the Russian military and scientific communities continue their massive restructuring, the chances that a rogue or terrorist group will purchase fissionable material, a nuclear weapon itself, and the technical expertise to go with it seem to be increasing dramatically.<sup>14</sup>

As the Office of Technology Assessment notes, the lack of a sophisticated delivery system does not mean rogue states or non-state actors cannot use WMD: “A nuclear device planted by terrorists or commando squads, or delivered by disguised cargo ships, aircraft, or even small pleasure craft, could kill just as many people as one delivered by an ICBM; a given quantity of lethal microorganisms effectively spread by human agents might kill even more than one delivered by missile.”<sup>15</sup>

For those states, groups, or persons unable or unwilling to acquire and use WMD, the large scale conventional explosive placed at a strategic location remains a potentially devastating weapon. The bombing of the federal building in Oklahoma City in 1995, the World Trade Center bombing in New York in 1993, and the 1996 Al-Khobar Towers bombing in Saudi Arabia all were such weapons. Demonstrably in the first two and arguably in the latter, the intent was to create a synergistic effect between weapon and structure which would enhance the destructiveness of the event. Combined, all three attacks killed 187 Americans, including children, and yet, all three would have been far worse if the explosive had been somewhat larger or more cleverly placed. If the World Trade Center had collapsed, the casualties would have been in the thousands.

If WMD and conventional bombs are not enough to ponder, consider the developing threat to American infrastructure by information and cyber warfare. A growth field populated now more by independent hackers and global organized crime, the potential for terrorist or rogue state use is real. There is a fine technical line between the criminal seeking to steal millions of dollars via the Internet and the rogue state or terrorist seeking to destroy or disrupt a nation's financial system, its power distribution grid, or its telecommunications network. While not unprotected, our computers and infrastructure are vastly under protected.<sup>16</sup>

#### New Faces and Old

Rogue states are remarkably resilient. Today's list would be much the same as a decade ago: Iraq, Iran, Libya, and North Korea.<sup>17</sup> A strong case seems to be developing to add Sudan to the list based on its sponsorship of terrorist camps as well as on its own

efforts, such as the attempt to assassinate Egypt's President Mubarak. Some might argue for the inclusion of Syria as a rogue actor, based on its persistent tacit support of terrorists operating from Syrian-controlled land. Similarly, some terrorist groups from past decades remain influential and destructive today, including factions of Hamas and Hezbollah.

Within the ranks of terrorists, however, there are a number of new faces. Shoko Asahara's huge *Aum Shinrikyo* group apparently planned to set up an alternative government in Japan as it destroyed the current state. With some 10,000 members and its own ministries, laboratories, and armories, *Aum Shinrikyo* is clearly one of the largest terrorist groups.<sup>18</sup> On the opposite end of the spectrum, some of the American-grown militias are minuscule in both numbers and resources, yet no less violent than Asahara's following.

Globally organized crime increasingly is recognized as a threat, not just to individuals or society, but to a nation's very sovereignty. There is a growing realization, in the view of FBI Director Louis Freeh, that the "ravages" of transnational crime are the greatest long-term threat to the security of the United States in particular, and democratic societies in general.<sup>19</sup> To call global crime a growth field is to drastically underestimate the current situation. It is estimated that some 5,700 criminal groups operate in the former Soviet Union, with some 200 operating in 29 other countries, including the United States.<sup>20</sup> While drugs and money laundering are the largest undertakings, nuclear fissile trafficking and computer fraud are areas of future growth. Profit, rather than ideology or destruction, remains the primary motivation for transnational criminals, and international principles of order are trampled along the way.

Not only are new faces joining the previous known list of rogues and terrorists; there is also a measurable, qualitative increase in the lethality of potential and demonstrated threats. Bruce Hoffman notes that, beginning in the 1980s, terrorist operations tended to kill more people than before.<sup>21</sup> Hoffman suggests they may be more lethal because: terrorists apparently equate greater lethality with more attention; terrorist organizations are more effective and proficient today; a resurgence of a nihilistic form of religious terrorism; and increased state-sponsorship of terrorism.<sup>22</sup> Whatever the reason, more terrorists are seeking greater destruction than before -- often without even attempting to claim responsibility for their sensational acts.

#### *The Collapse of Controls*

The collapse of the Soviet empire diminished the threat of a massive conventional war in Europe, and also lessened the threat of global nuclear war. However, a subsequent collapse of "controls" has increased the threat to the United States from rogue states, terrorist groups, and transnational criminals. The lack of a bipolar balance of power has increased inter and intrastate conflict worldwide, with the US, as the world's indispensable power, much more visible, engaged, and vulnerable worldwide. Uncertainty, if not chaos, has replaced the previous political and military controls of the Warsaw Pact -- NATO face-off. The absence of physical controls over former Soviet nuclear weapons, materials and technology allows leakage to other nation-states, rogues, terrorists, and criminals. Globally, there is inadequate international law enforcement -- police control -- over criminal groups organized transnationally, with their own armies and resources that dwarf

those of many nations. The result is a unpredictable series of global crises occurring simultaneously with a breakdown in international principles of order.

And what is the impact on the U.S.? As a world leader, for better or worse, we are compelled to act globally: we send military force where either our interests or our humanity lead. We provide aid, both military and humanitarian, on a worldwide basis. We deny the same to those few nations who we think demonstrate a disregard for international conventions. Both cases make us the target of states and groups who want either more from or less from the U.S. We are highly visible global actors. And visibility breeds vulnerability.

By its very nature -- democratic, open -- the U.S. is vulnerable at home as well as abroad. Democracy, American style, is fundamentally at odds with effective security. Few nations have an "open door policy" as lenient as ours, nor a home front more permeable. Technically sophisticated, our technology -- like our open society -- also makes us vulnerable.

#### New Capabilities and Opportunities

The U.S. is vulnerable. Recent terrorist attacks, the threat of nuclear leakage from former Soviet states, the revelations of significant and advanced WMD programs in several rogue states, all have awakened us to our vulnerability. However, we are not helpless. U.S. capabilities in information processing, intelligence, and strike warfare grow daily, as does the cooperation between intelligence agencies, the military, and law enforcement agencies.<sup>23</sup> There is a growing international consensus which points, if not leads, to changes in international legal conventions.<sup>24</sup> Finally, but most important, the

dangers of the changed environment and the potential of preemption is starting to receive infrequent, but discernible public mention from U.S. decisionmakers.<sup>25</sup>

*Hurts Too Much*

Why should decisionmakers consider preemption? The bottom line is that WMD, as well as certain conventional bombs and information warfare, in the wrong hands, are potentially so destructive that their use cannot be allowed. If certain acts -- which threaten the lives or livelihood of hundreds or even thousands -- can be prevented, then we believe preemption -- a military but defensive-oriented preemption, should be considered in U.S. security policy.

## Chapter 1 Endnotes

- <sup>1</sup> United States, Office of the Secretary of Defense, *Proliferation: Threat and Response* (Washington: Government Printing Office, April 1996) 24-25.
- <sup>2</sup> Paul Wilkinson, ed., *Technology and Terrorism*, (London: Frank Cass & Co., 1993) 5. Also "Libyan CW raises the issue of pre-emption," *Jane's Intelligence Review* November 1996: 522.
- <sup>3</sup> *Proliferation, Threat and Response*: 26.
- <sup>4</sup> Thomas C. Wiegele, *The Clandestine Building of Libya's Chemical Weapons Factory* (Carbondale: Southern Illinois University Press, 1992) 30.
- <sup>5</sup> Phillip Finnegan, "Libya Ceases Work on Chem Factory," *Defense News*, December 16-22 1996:1.
- <sup>6</sup> *Jane's Intelligence Review*: 523.
- <sup>7</sup> United States, The White House, *A National Security Strategy of Engagement and Enlargement*, (Washington: Government Printing Office, February 1996), 18.
- <sup>8</sup> For example, see Barry R. Scheider, *Radical Responses to Radical Regimes: Evaluating Preemptive Counter-Proliferation*, (Washington: Institute for National Strategic Studies, McNair Paper 41, May 1995), vi, 23-26.
- <sup>9</sup> Victor A. Utgoff, *The Challenge of Chemical Weapons: An American Perspective*, (London: Macmillan Press, 1990) 81-82. Also see *Proliferation: Threat and Response* 20-21.
- <sup>10</sup> See Bruce Hoffman's balanced argument in Wilkinson's *Technology and Terrorism* 23-24.
- <sup>11</sup> Charles Smith "Soul Searching," *Far Eastern Economic Review* 25 May 1995: 14-15.
- <sup>12</sup> U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks*, (OTA-ISC-559) (Washington: U.S. Government Printing Office, August 1993) 39.
- <sup>13</sup> Malcom Dando, *Biological Warfare In The 21st Century: Biotechnology and the Proliferation of Biological Weapons* (London: Brassey's, 1994) 3.
- <sup>14</sup> Graham T. Allison, Owen R. Cote, Jr., Richard A. Falkenrath, and Steven E. Miller, *Avoiding Nuclear Anarchy* (Cambridge, Massachusetts: The MIT Press, 1996) 21, 47-48. Also Linnea P. Raine and Frank J. Clifford, eds., *Global Organized Crime: The New Empire of Evil*, (Washington: Center For Strategic and International Studies, 1994) 88-89.
- <sup>15</sup> US Congress, Office of Technology Assessment, *Proliferation*, 50.
- <sup>16</sup> Raine and Clifford ix-x. Also Thomas E. Ricks, "Information-Warfare Defense is Urged," *Wall Street Journal* 6 Jan. 1997: B2.
- <sup>17</sup> Raine and Clifford ix.
- <sup>18</sup> Smith 14-15.
- <sup>19</sup> Raine and Clifford ix.
- <sup>20</sup> Raine and Clifford ix.
- <sup>21</sup> Bruce Hoffman, "Terrorist Targeting: Tactics, Trends, and Potentialities," in Paul Wilkinson, ed. *Technology and Terrorism*, (London: Frank Cass, 1993) 14.
- <sup>22</sup> Hoffman 14-18.
- <sup>23</sup> Pat Cooper, "U.S. Intelligence Vows To Intensify Antiterrorist Efforts," *Defense News*, Sept. 16-22 1996: 44.
- <sup>24</sup> United Nations Secretary General Boutros-Boutros Ghali, address, John F. Kennedy School of Government, Harvard University, 24 October 1996, cited in Sean Healy, "Boutros Ghali seeks cooperation in on-going fight against terrorism," *The Citizen*, Nov. 4 1996: 4.
- <sup>25</sup> In 1996, Speaker of the House Newt Gingrich advocated a "doctrine of pre-emption," stating the U.S. should be ready to carry out military strikes against nations suspected of plotting attacks against American targets. See David Morgan, "Gingrich U.S. must act first against terrorists." *Reuters North American Wire*, 20 Aug. 1996. In his 1997 State of the Union Address, President Clinton stated "We are working with other nations...to stop terrorists before they act..." William Clinton, "State of the Union Address." Capitol, Washington, 4 Jan. 1997.

# 2

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## Thinking About Preemption: A Framework

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### The Variables: Parameters for Decision

*Preemption: the word alone is enough to excite journalists the world over and send every politician and bureaucrat within miles to seek cover. In the previous chapter, we defined what it is and why we think its time to consider it as a policy option. Now we move to structure--what we think key components or variables of preemption are, and how the decisionmaker can rationally consider its use.*

Preemption has a multitude of aspects, and is made up of a number of integral components. We combine both into what we term the variables of preemption: those points which a decisionmaker should take into account when thinking about preempting. The key variables described here are the primary decision factors and aspects, which when applied to a specific scenario in a systemic way, aid the decisionmaker in selecting or rejecting preemption as a viable course of action. While there are, in fact, many variables one can conceive of, all are not equal; in fact we believe only four are absolutely essential for good decisionmaking: the military variable; the national and foreign policy variable; the legal variable; and the ethical and moral variable. Within our group of four, the variables

are not co-equals in the decision scheme: some will be more important than others, depending on the situation.

Our variables are neither a recipe for action nor a checklist for guaranteed successful preemption. At the least, they provide a framework or structure for rational thinking and decisionmaking. At the most, they will indicate areas of concern that can affect the prospects for success and influence the long term impact of action.

### **The Military Variable**

If there is any one predeterminant required for preemptive action, the military variable is it. To prevent an adversary from committing a destructive act or achieving a significant destructive capability the adversary must be convinced or coerced. In both cases -- convince or coerce -- the use or threatened use of force is key. In domestic law enforcement, the police and federal authorities provide that force. When dealing with other nations, including "rogue" nations, the military provides the force. Although controversial now, in the gray area occupied by transnational terrorists and criminals, we believe it will be a mix of law enforcement and military force that proves effective.

Our discussion of the military variable begins with feasibility, then moves to timing, collateral damage, and then to the case for multilateral responses. We conclude this section with an examination of the consequences of failure and success.

### **Feasibility**

A key question decisionmakers need to ask when considering preemption is often the most difficult to answer in a satisfactory way: is preemption militarily feasible? Can it -

- the preemptive action -- really be accomplished? Feasibility is determined largely by intelligence and capability. Sufficient intelligence and adequate military force are both catalyst and enabler of preemption -- the "precursors" without which any discussion will be strictly academic.

#### **Feasibility: the intelligence component**

Intelligence plays the significant role throughout the decisionmaking process. It provides strategic warning, analyzes adversary intentions and capabilities, provides operational, "real-time" information at the nexus when an adversary's opportunity seems likely to produce action, and assesses the situation after a decision is made.<sup>1</sup>

Strategic warning is a complex, often convoluted process. Addressing the WMD counter-proliferation effort alone, the Clinton administration noted:

the Intelligence Community must provide accurate and timely intelligence assessments on the motivations and plans of leaders in states that may elect to develop NBC weapon capabilities, the clandestine procurement networks used by these states, the status of their NBC weapon programs, and the locations of both weapon production capabilities and deployed weapons. Information on NBC weapon-related intentions, capabilities, and activities of transnational groups, such as ethnic or regional movements, terrorists groups, or organized criminal elements, also is needed. This is a demanding set of requirements.<sup>2</sup>

To say the least. Add to the WMD scenario other acts which America cannot tolerate, such as massive deaths from conventional bombs or catastrophic destruction of

infrastructure, and clearly any single intelligence agency would be hard-pressed to fulfill the administration's mandate.

Once a potential adversary is identified, strategic warning plays a pivotal and increasingly crucial role in driving the policy process. Critical to that process is assessment of the exact nature of the threat posed by the adversary, and subsequently the degree of risk represented by that threat. Decisionmakers and intelligence experts serving them need a relatively simple, mutually understandable framework that translates the various microscopic details of intelligence analysis into a macroscopic organized body of thought that enables both groups to interpret and assess analytical components of threat warning and assists decisionmakers in formulating coherent policy objectives.

Many factors need to be analyzed and evaluated by intelligence and warning experts as more is learned about the threat, and ideally those factors will be articulated to policy makers through in a framework which allows recognition and concise appreciation of the magnitude of a particular problem. We propose for this framework that policy makers and their experts consider the adversary's history, capabilities, intentions, opportunity, and actions:

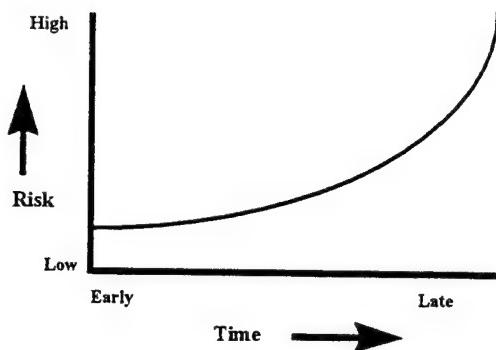
H = History:	Previous actions or planning by a potential adversary.
C = Capability:	Physical ability of a potential adversary to deploy and employ a weapon or destructive agent, or ability to execute an attack.
I = Intentions:	Resolve of a potential adversary to cause harm.
O = Opportunity	Alignment of factors which would allow a potential adversary favorable occasion to employ/deploy a destructive agent or attack.
A = Actions	Observable or otherwise detectable overt steps by a potential adversary to employ/deploy a weapon or destructive agent or attack.

This is a schematic and idealized framework, not a precise formula. It provides a methodology useful for an initial threat and risk assessment, and later for continuity during iterative assessments as more information is collected or as the threat continues to develop over time.

Generally speaking, in any given scenario these criteria develop in a chronological sequence. For example, an adversary cannot act until first he has developed the capability to act. Also, the weight of individual criterion are determined by the situation: we may not know an adversary's intentions and so our analysis must be concerned with and guided commensurately by his capabilities. To the extent that these criteria are observable, or are at least subject to analysis, they provide not only a minimum framework for assessing threat maturity, but also a sense of how urgent the need for response may be, depending upon unique scenarios. Once these threat factors are determined and analyzed, net assessment of risk can be made.

In our framework, assuming sequential and chronological development of threat, as time passes, risk increases (see figure 2-1). Again, this is a notional curve which illustrates a relational concept, not necessarily a precise mathematical formula for risk determination.

### TIME VS. RISK



*Figure 2-1*

Our criteria can align along this simple threat curve to demonstrate visually the chronological and sequential relationship between time, threat, and risk development. This assessment framework is used not only to develop a net assessment but also to determine, in a relative sense, a policy maker's "decision environment": simply stated, the more developed the threat, the greater the risk and hence the more urgent the need for the policy maker's attention to the problem. In the framework presented in figure 2-2, the decisionmaking environment is labeled in relative terms such that, as more criteria are detected or assessed by the intelligence community over time, risk increases, so the friendly opportunity window for responsive decision and action narrows considerably.

If intelligence identified every threat during its formative stages, time would matter less than it does normally. In reality, because strategic warning is so difficult, the decisionmaker often is not even aware of a threat until several factors have aligned and the situation is now a crisis stage.

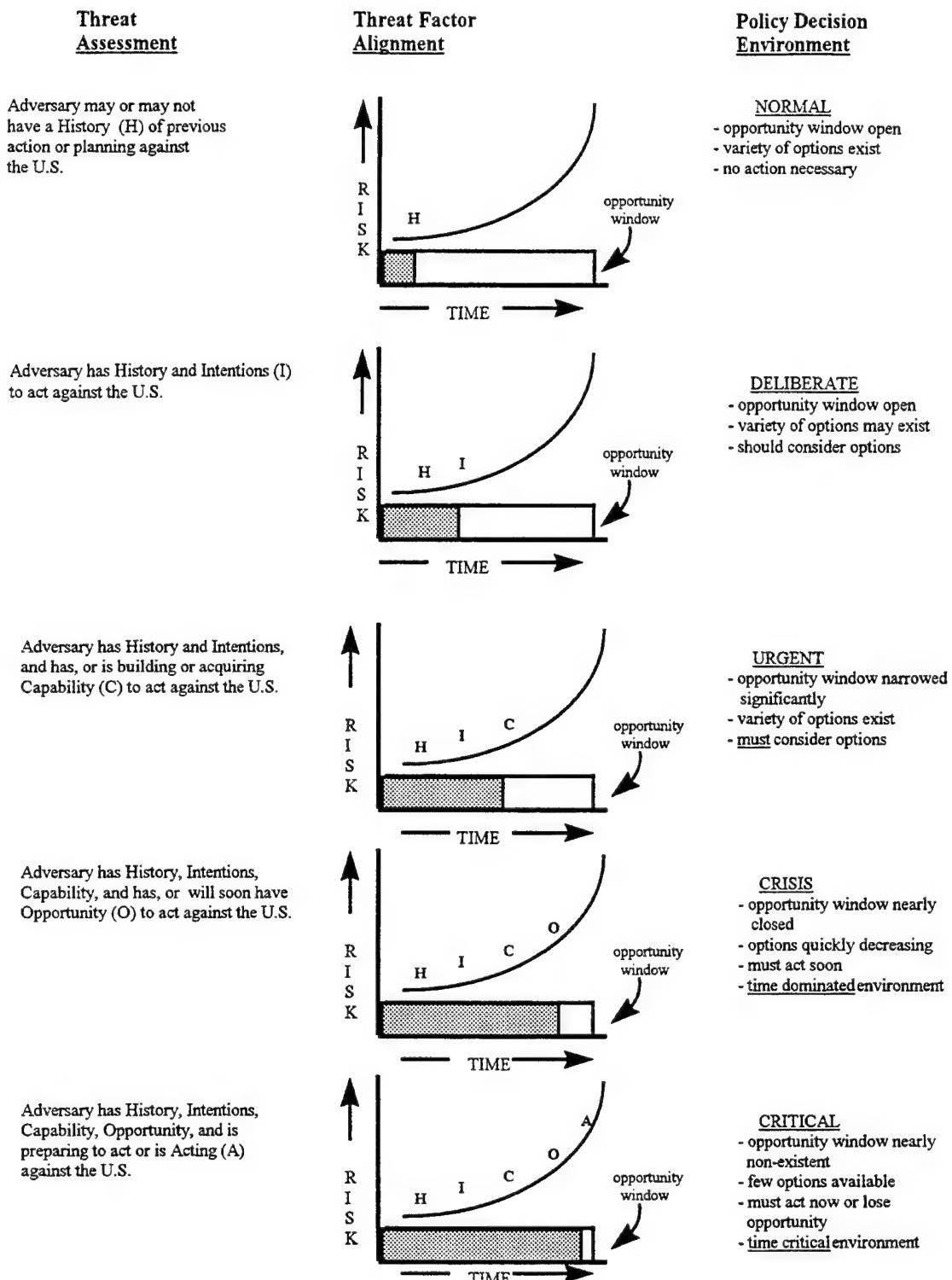


Figure 2-2

U.S agencies are particularly well-suited for certain types of intelligence gathering on a potential adversary's history, capability, and actions. Strong points are data storage and manipulation, technical oversight, communications intelligence, and remote sensing of known facilities, areas, and targets. Determining specific intentions and pinpointing opportunities however, often are non-technical, and more often lie in the realm of human intelligence, and frequently play at the boundaries of domestic law enforcement and transnational crime and terror, an area which is not an American strong point.<sup>3</sup> All of this is to state what may be painfully obvious to many decisionmakers already: strategic warning is an "iffy" thing, and getting adequate time to engage the bureaucracy in lengthy course of action development is never certain.

A good, common sense approach for decisionmakers to use when thinking whether preemption is feasible based on available intelligence is to ask the following questions. First, do we know what the threat is (is this a WMD, a conventional weapon, info/cyber attack?)? Next, is the threat against U.S. vital interests? Do we have enough information to identify who -- be it a nation, group, or individual -- is behind the threat? Finally, do we know where the threat is?

Without positive answers to the above, there is not enough intelligence to make preemption a feasible option at this time. However, one note of caution. While we are right to expect the most and best intelligence we can get on any particular situation, and we almost always desire to improve the intelligence picture, we cannot insist on perfect knowledge in every instance. This is especially true in a warning arena where adversaries deliberately act to confound and defeat our collection capabilities. We must accept that there always will be ambiguity in the warning information we receive. To allow these

ambiguities to reduce us to total inaction constitutes a policy of paralysis. When potential losses are so great -- such as those from WMD -- then we may be compelled to act with less intelligence than we would prefer.

A further role for intelligence is to provide the information required for legal evidence, as well as to enlist the support of allies before and after the fact. This role means just knowing is not adequate -- intelligence must be able to demonstrate credibly both adversary intent and capability in pictures, recordings, and the like. This is often far more difficult a task, which leads decisionmakers to want more time, even to the point of waiting past the time that preemption is militarily feasible.

*Feasibility: the military component*

The other component of feasibility is coercion. In our study, we specifically examine military force. The U.S. now has a relative plethora of military units devoted to counter-terrorism, as well as substantial capability for long range interdiction of hard targets from both manned aircraft and unmanned weapons. The problem today and in the future is relevancy: do we have the right force for the task now at hand?

The range of military missions we envision is vast: destroy a WMD facility buried deep in a hillside or underground; locate and disarm a WMD; interdict adversaries and/or their threat both home and abroad, domestically amidst the public or within other nations, sanctuaries, and such; identify, locate and neutralize info/cyber warriors before they strike. The particulars are many, but the broad requirements entail a force trained to quickly recognize and disable or neutralize nuclear, biological and chemical weapons and weaponized agents as well as the huge conventional bombs used in the Beirut Barracks

Bombing of 1983 or the 1995 Oklahoma Federal Building bombing. Needed capabilities include precision weapons which can penetrate tens of meters of concrete or rock and computers and programs to detect and hunt down intrusive hacker attacks and attackers.

The U.S. currently is addressing self-perceived shortfalls in military capability in WMD and info/cyber warfare areas.<sup>4</sup> With respect to WMD, DOD has begun a number of complementary initiatives under the rubric of the Defense Counterproliferation Initiative. The Unified Command Plan was revised in 1995 to assign U.S. Commanders in Chief (CINCs) the responsibility to specifically include counter-proliferation as a task within their mission to defend U.S. national interests abroad. Money for new equipment and capabilities was made available, and plans and doctrine written. Extensive programs to prevent or control the movement of intellectual capital, precursors, and technology are in place.<sup>5</sup> At the forefront of capability, teams similar to the Department of Energy's Nuclear Emergency Search Teams (NEST) have been formed to combat Chemical and Biological threats.<sup>6</sup> What remains to be seen is how relevant this newly formed capability is to confront the threat. For example, since the WMD threat cuts across international borders as well as state versus federal jurisdictions, a useful capability would be some sort of international WMD emergency response team capable and authorized to respond to nuclear, biological and chemical incidents on a global basis.<sup>7</sup>

When considering preemption, decisionmakers should ask these questions regarding capability. Is there a clear-cut military mission that could preempt the threat? Do we know what constitutes success? Is success likely? Is there an existing -- not ad hoc -- force or capability to address this type of threat?

A key point to remember about the likelihood of success: the type of threats we are talking about deal with results of exceptional destructive potential. While in some cases, the probability of success may be objectively low, but the rational decision will still be to attempt preemption, because the consequences of inaction are unacceptable.

### Timing

Finding the correct time to preempt a threat is a dilemma in itself. The longer a threat is allowed to develop, the more intelligence and evidence is gathered -- making both political and public justification easier. On the other hand, the longer the threat develops, the harder it is to actually preempt militarily.

This inverse relationship is shown below in figure 2-3.

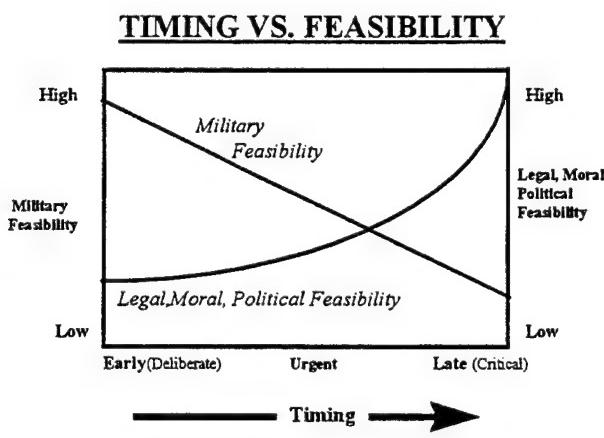


figure 2-3

As time elapses and the threat builds, the legal, moral, and diplomatic variables all are enhanced by the increasing information on the adversary's history, intent, actions, and opportunity. The military, however, is in a race with time. As an example, when first discovered, preempting a chemical plant under construction would be difficult to justify,

even in a rogue state. As other means to stop construction or production are used and exhausted and more intelligence is gathered to refine the adversary's ultimate objective, justification gets easier. From the military preemption angle, however, time is an enemy. The longer the adversary builds its threat, the more difficult it is to preempt: the site or capability may be "hardened" and protected; the capability may be weaponized and then dispersed; the likelihood of collateral damage increased, say through fallout or chemical or biological agent release into the atmosphere. While the military too feeds on extensive intelligence, there is an optimum time militarily to strike, and it is often before a rational decisionmaker may feel justified in ordering a preemption. Another way of looking at it is that the more threatening a capability, the less vulnerable it becomes. At the same time, the easier it is to justify preempting, but the more difficult it becomes to militarily execute a preemption.<sup>8</sup>

Two key questions for decisionmakers concerning timing are: Is preemption militarily feasible at this time (can it actually be carried out with some likelihood of success)? Am I satisfied that I could explain the threat, the risk to U.S. interests, and the need to preempt to a representative group of American citizens and they would understand (if not agree)?<sup>9</sup>

### *Collateral Damage*

Collateral damage is a legalistic and antiseptic term for the unintended casualties of military action. Limiting collateral damage normally is a political and moral imperative imposed upon military planners. Adequate intelligence and disciplined rules of engagement help mitigate unnecessary destruction, but using force proportionate to the threat and

sufficient to achieve desired results is also important. However, even a proportional response is a problem when preempting WMD, especially once weaponized, during transport, or under production.

Concern over collateral damage shaped the political debate prior to and determined the timing of the Israeli preemptive destruction of Iraq's Osirak nuclear reactor at Tuweitha in 1981.<sup>10</sup> It apparently also limited the timing of any proposed U.S. preemption of Libya's chemical plant at Rabta: "...there was a rather small window of time in which an attack was credible. As the Rabta facility became operational, there was danger that an attack would release noxious chemicals into the atmosphere, and those chemicals would inflict unintended damage on the towns near Rabta and conceivably on other nations."<sup>11</sup>

Notwithstanding the need to limit unnecessary destruction, other concerns may be equally or more important than collateral damage -- keep in mind, our study deals with threats that would result in massive American casualties or destruction if allowed to occur. Decisionmakers must balance the relative merits of preemption against the possible political liabilities from collateral damage that preemptive action could cause.

From the military viewpoint, perhaps the best that can be done regarding collateral damage is to constantly stress to planners and operators alike the imperative to limit to the smallest number the innocent casualties and unintended damage. And all they can do is their best.

Four critical questions for decisionmakers concerning collateral damage are: What collateral damage is likely if preemption succeeds? What if it fails? Can it be justified in

comparison to the threat? Could I justify to a representative group of Americans the probable collateral damage of this preemption?

### The Case for Multilateral Response

Prevention of and response to many of the potential threats to America from rogue states and non-state actors are impeded by legal jurisdictions and international geographical boundaries. In such instances, a unilateral response may seem insufficient. For example, consider the complexity of a notional situation in which a NATO member state knowingly provides technology and technical know-how *quid pro quo* to a rogue state, which in turn purchases nuclear, chemical or biological precursors through the assistance of transnational criminals, ultimately to sell the weaponized capability to a terrorist group for use against a mutual enemy, in this case the U.S.

Such an international scheme would best be addressed with a multilateral response, starting with diplomacy, coercive diplomacy, and economic sanctions. A public disclosure aimed at international pressure might embarrass and thus deter the offending state from a repeat action -- but the damage is done. As the threat builds in urgency, multilateralism aids justification in preventive and coercive diplomacy. The U.S. attempted such a program with mixed results during the building of Libya's Rabta plant, especially in response to German business support of the facility.<sup>12</sup> Israel attempted the same against French support of Iraq's Osirak reactor, without positive result.<sup>13</sup>

However, once a threat has become a crisis, a multilateral response is more difficult to envisage. In most cases, a specific preemptive act must be covert at least until completed; however, a covert multilateral preemption is almost an oxymoron. For

example, in the multilateral arena, there is no overarching international agency or formal process to directly address intelligence development and sharing, nor any ability to plan and execute a multilateral preemption against threats from WMD and info/cyber warfare. There is no WMD “Interpol” to develop intelligence across the international spectrum.<sup>14</sup> There are no international response teams to deal with the results of a WMD weapon. There are no international forces to stop terrorists before they act.

In many cases, other nations have no desire to be seen participating in or even tacitly supporting U.S. military action, much less something as sensitive as preemption. When the U.S. is either unable or unwilling to provide hard evidence concerning the threat or the background of a specific case, it is exceedingly difficult to garner external support.<sup>15</sup> Think of the international uproar and lack of cooperation when the U.S. retaliated against Libya with bombings in Tripoli and Benghazi.

Important questions for decisionmakers pondering multilateral preemption are: Is there an international interest in stopping the threat? If so, can documented evidence be provided to the public or like-minded nations to engender support? Is there a specific international or multilateral capability which will boost the chance of success? Can the U.S. use this capability? If the U.S. goes with a multilateral or international response and the preemption fails, will the result be worse than the threat motivating the initial attempt?

### *The Consequences of Failure and Success*

A failed military preemption would be a personal disaster to everyone who participated. It would likely result in stinging international criticism or even some form of sanction against the U.S. Moreover, failure to eliminate the threat may actually lead to

conflict, either war waged by an affected state or a retaliatory “war” waged by a nonstate actor. Success itself brings far more welcome outcomes, but it too may come with some unwelcome “baggage.”

The failure to eliminate fully a WMD threat might be the worst of all outcomes. As Barry Schneider notes, “strikes against states armed with WMD had better work completely or they could spell disaster for the initiator.”<sup>16</sup> An adversary who has been attacked knows he could be attacked again at any time, thus his timeline for action is now critical. The adversary may be more willing to actually use what residual capability he possesses as reprisal for the original failed U.S. preemption. Bad as that seems, especially if the retaliation is in the form of WMD, the follow-up U.S. counter action likely will feed further reprisal -- a tit for tat that is clearly escalatory.<sup>17</sup>

A public failure would also set the stage for international condemnation, and congressional investigations, as well as domestic public disapproval. Two failed American rescue missions--the Son Tay raid and Desert One--generated all of the above, even when the intent was only to retrieve Americans held hostage.

A successful preemption would eliminate or delay the threat to U.S. lives, property or interests. In the types of threats we are discussing--WMD, massive conventional bombs, and info/cyber warfare against infrastructure--successful preemption made public would still be subject to close scrutiny or “cross-examination” by other states, the United Nations, the congress and the public. The end result, however, likely would be largely supportive, especially at home, were it matters most.

Successful preemption also may have a significant deterrent effect on other states and actors, as well as the targeted rogue state or non-state actor. How long this effect

would last is unknown. Threats to preempt also may have a deterrent effect, especially if the capability to do so is known to exist. This threat to preempt may deter states and groups totally unassociated with the original threat and successful preemption.

If the adversary's intentions remain after a successful preemption, then the outcome may be a "preemption paradox." A determined foe may be temporarily stopped by preemption, but will likely be driven underground, figuratively and possibly literally. We call this lateral displacement. As an example, American coercive diplomacy and threat of preemption may well have caused Libya to eventually close the Rabta chemical plant. However, the adversary -- Libya's leader Qadhafi -- and his intent remained. Libya began to build yet another chemical plant underground, at Tarhunah, probably to avoid detection as long as possible and to preclude future preemption. And so the adversary is led to better mask future activities from detection, and make future interdictive efforts more difficult. Other lateral displacement options might be to move the threat capability to another area, even another state, or to pick other, perhaps easier, targets. In other situations, the adversary may choose to displace vertically, to move from chemical attacks to biological or even nuclear terrorism. Ultimately, vertical displacement is highly escalatory.

In the end, successful preemption may result only in buying America time: time to convince, coerce, sanction, and build consensus. Used against a determined adversary intent on killing and destroying Americans and America, these measures could well fail, and the ultimate recourse may be massive retaliation.

Perhaps the most important questions about preemption deal with its ultimate consequences, in failure and success. Some of the most important are the following:

Will the preemption we contemplate eliminate the adversary's intent? How? Does it eliminate the adversary, and if so, is that elimination required for conclusive results? Can we explain adequately to the American public what we did in success or tried to do in failure? What options are available if preemption fails against a WMD threat? Will the threat of preemption likely accomplish our objective? If successful preemption results in the adversary moving laterally, say underground or to another state, or vertically, say to biological or nuclear weapons, is this result worse than the original threat?

In the preceding pages, we have discussed the military issues of capability and feasibility, and posed what we think are key questions that help frame an analysis of specific preemptive courses of action. We turn our attention now to an equally important component of the decisionmaking process, the national and foreign policy variable.

## Chapter 2 Endnotes

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<sup>1</sup> This assessment is important regardless of whether the decision to preempt is positive or negative. If preemption is ordered and takes place, intelligence will seek to determine its effectiveness in eliminating the threat, even temporarily, as well as what the adversary may seek to do in response. In a decision *not to* preempt, intelligence will seek to provide analysis for impact of the threat and the foundations for follow-up after the fact (for retaliation, apprehension, and legal back-up).

<sup>2</sup> United States, Office of the Secretary of Defense, *Proliferation: Threat and Response*, (Washington: Government Printing Office, April 1996) 55.

<sup>3</sup> As we write, considerable effort to strengthen U.S. capability in these critical areas is being taken. See: *Proliferation, Threat and Response* 55; also see recommendations in *Combating Domestic Terrorism*, Hearing Before The Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives 104th Congress, 1st Session, (Washington: Government Printing Office, 3 May 1995) 8-9.

<sup>4</sup> An internal assessment in 1996 prepared for Deputy Defense Secretary John White says U.S. military counter-terrorist plans against WMD are "inadequate," and calls for a coordinated effort amongst DoD and civilian agencies to plan, detail procedures, and train. See Barbara Starr, "DoD review finds holes in US counter terror plans," *Jane's Defense Weekly*, 2 October 1996: 8. Similarly, a Defense Science Board appointed panel warned of an "electronic Pearl Harbor" with all the "ingredients in a recipe for a national security disaster." The panels recommendations include establishing an info warfare center and appointing a "czar," as well as giving the Pentagon the legal ability to repel and pursue those who try to hack into its computer systems. See Thomas E. Ricks, "Information-Warfare Defense Is Urged," *Wall Street Journal*, 6 Jan 1996: B2.

<sup>5</sup> *Proliferation, Threat and Response* 47-56.

<sup>6</sup> Barbara Starr, "Chemical and Biological Terrorism," *Jane's Defense Weekly*, 14 Aug. 1996, 16.

<sup>7</sup> Robert D. Blackwill and Albert Carnesdale, eds., *New Nuclear Nations: Consequences for U.S. Policy*, (New York: Council on Foreign Relations, 1993) 258.

<sup>8</sup> This critical timing relationship is discussed in a nuclear context by Philip Zelikow in "Offensive Military Options," in *New Nuclear Nations, Consequences for U.S. Policy*, ed. Robert D. Blackwill and Albert Carnesale, (New York: Council On Foreign Relations, 1993)168.

<sup>9</sup> Ernest R. May provides a pragmatic and useful set of conditions governing the U.S. use of covert action which may apply also to preemption: is there a public consensus on the interest being served; clear feasibility; and tolerance for disclosure. See Roy Godson, Ernest R. May, and Gary Schmitt, eds., *U.S. Intelligence at the Crossroads, Agendas for Reform*, (Washington: Brassey's, 1995) 177.

<sup>10</sup> See Shlomo Nakdimon, *First Strike*, (New York: Summit Books, 1987) 165, 219.

<sup>11</sup> Thomas C. Wiegele, *The Clandestine Building of Libya's Chemical Weapons Plant*, (Carbondale, Illinois: Southern Illinois University Press: 1992) 127.

<sup>12</sup> Wiegele 60.

<sup>13</sup> Nakidom 63, 72-80.

<sup>14</sup> On Nuclear Interpol, see Graham T. Allison, Owen R. Cote' Jr., Richard A. Falkenrath, and Steven E. Miller, *Avoiding Nuclear Anarchy*, (Cambridge, Massachusetts: The MIT Press, 1996) 175.

<sup>15</sup> Wiegele notes this in reference to Rabta: "Part of the difficulty the United States had in making its case against Libya was that the United States offered little hard or documented evidence to the public." See Wiegele 125.

<sup>16</sup> Barry R. Schneider, *Radical Responses to Radical Regimes: Evaluating Preemptive Counter-Proliferation*, (Washington D.C.: Institute for National Strategic Studies, McNair Paper 41, May 1995) vi. Also see Jerome H. Kahan, *Nuclear Threats From Small States*, (Carlisle Barracks, Pennsylvania: April 1994) 15.

<sup>17</sup> This is an intuitive argument. For a counter- argument that states preemption seldom leads to war, see Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security* (Fall 1995): 33.

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## National and Foreign Policy Issues

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### Scope

Military preemption may provide a tool to counter the threat posed by WMD and other high technology weapons, but that tool will: (1) not be available if national policy does not support deployment of necessary capabilities, and (2) not be employed in a timely manner if use of force is the last resort of U.S. foreign policy. As discussed in the previous chapter, timing may be critical to successful preemption. The time for debate and diplomacy is before the friendly window of opportunity closes. This chapter will discuss briefly why current national policies are inadequate and why, in the international arena, established mechanisms for conflict avoidance and resolution are ill suited to address this looming threat.

## National Policy Development

*Americans will not tolerate the preventable deaths of U.S. military or civilian personnel at home or overseas.* Public and Congressional reactions to the 1996 Khobar tower bombing demonstrated that “ongoing negotiations” is not an acceptable excuse for failure to defend American lives. The first step in the development of a coherent national policy is agreement that a vital national interest is threatened.

*“The proliferation of weapons of mass destruction represents a major challenge to our security....And the threat to our open and free society from the organized forces of terrorism, international crime and drug trafficking is greater as the technological revolution, which holds such promise, also empowers these destructive forces with novel means to challenge our security” - President William J. Clinton<sup>1</sup>*

*“The bad news is that in this era the simple threat of retaliation that worked during the Cold War may not be enough to deter terrorists or aggressive regimes from using nuclear, biological or chemical weapons.”*

*- Secretary of Defense William J. Perry<sup>2</sup>*

These and similar statements by other Executive and Legislative branch leaders are indicative of a broad consensus that international crime and terrorism are among the most immediate threats to the security of United States citizens and institutions. The President’s “National Security Strategy” states that we will need the capability not only to

deter attacks against ourselves or our allies, but also, where necessary and feasible, to prevent them. The threats which are the focus of this study are those which are unlikely to be deterred either by threat of retaliation or by international political pressure. Even the threat of preemption may be ineffective. If a rogue state, terrorist or criminal group cannot be deterred, then actual preemptive action may be the only alternative to absorbing a devastating attack.

Regardless of the threat and the actors, domestic political support of preemption is problematic if a national preemption policy has not been vetted in advance. This is not to say that the policy ultimately implemented must be declaratory or that resort to use of force will be the only answer. What the U.S. will do in a given situation is best left ambiguous, but consensus on the interests to be defended and acknowledgment that narrowly-focused, measured preemptive action is an acceptable, sometimes necessary alternative, are prerequisites to adding this tool to our kit.

### **Current Policy of Massive Retaliation and Passive Defense**

Current U.S. counter terrorist and counter-proliferation policies do not rule out preemption of threats to vital national interests, but neither do they include any active consideration or preparation to preempt except as a last resort.<sup>3</sup> The issue is confused because policy statements do not discriminate among the various threats and hence do not prescribe responses tailored to specific threats. For example, the "National Security Strategy" states, "As long as terrorist groups continue to target American citizens and interests, the United States will need to have specialized units available to defeat such groups. From time to time, we might also find it necessary to strike terrorists at their

bases abroad.”<sup>4</sup> What is missing from the strategy is a clear statement that such strikes may be used to prevent attacks as well as to retaliate. The strategy also contains wishful statements such as “Positive results will come from integration of intelligence, diplomatic and rule-of-law activities, and through close cooperation with other governments and international counterterrorist organizations,”<sup>5</sup> but diplomacy and cooperation alone will not protect American lives from fanatic terrorists sponsored by rogue states.

The DOD Defense Counterproliferation Initiative will spend several billion dollars attempting to achieve four objectives: (1) prevent acquisition, (2) roll back proliferation, (3) deter use, and (4) equip and train U.S. forces to operate in an NBC environment. The initiative is a very comprehensive and well-focused effort to stem proliferation of NBC weapons and delivery vehicles to potentially hostile states. Program elements such as the Nunn-Lugar program have significantly strengthened the safety and security of nuclear weapons and fissile material in the former Soviet Republics. Other efforts will upgrade the passive and active defenses available to our military forces. The counterproliferation initiative, backed by threats of massive retaliation, may delay weaponization and deter overt use of nuclear, biological and chemical materials by rogue states; however, the initiative fails to address non-conventional threats which are likely to arise when the inevitable occurs and criminals or terrorists obtain fissile material, chemical weapons or biological agents.

A terrorist need not “weaponize” the material if primitive delivery methods are used. Outfitting soldiers with the latest in protective equipment is necessary to ensure that hostile forces are not tempted to use WMD to offset asymmetric conventional capabilities, but new passive protection devices for soldiers will not protect their family members

clustered on vulnerable overseas bases or living “on the economy” in a foreign country with no protection at all. Massive retaliation is a useless concept when responding to nonattributable covert action or attacks by non-state actors and criminals.

Other threats to vital national interests which do not involve weapons of mass destruction also are ignored in current national policy statements. The potential for massive disruption of services caused by cyber attacks on U.S. financial institutions, communications networks or other automated systems is increasing daily. Already, Iran is suspected of counterfeiting U.S. currency to undermine the dollar in Europe. Where will the next attack occur? If an attack could cause massive disruption of vital institutions, preemption may be warranted. No policy exists which would lead to development of necessary capabilities to detect or respond to such an attack.

### *A Framework for Political Decisionmaking*

Developing the capability to respond requires also a mechanism to decide. While the normal decision process for employing military force is well established, a decision to preempt is likely to be complicated by the conflicting requirement for both secrecy and consensus. While lack of secrecy could jeopardize success of the mission, lack of consensus could result in inappropriate use of force, such as the French sinking of the Greenpeace ship Rainbow Warrior in New Zealand. In response to an article on planning and coordination of covert action, Ernest May proposed, *inter alia*, that three criteria should be considered before undertaking covert action.<sup>6</sup> Those criteria, slightly modified, also would serve well when considering preemptive action:

- Is there clear public and congressional consensus about the national interest to be served? Would Ron Dellums and Newt Gingrich agree on it?
- Is the projected action militarily and bureaucratically feasible? Is all of the necessary support, both foreign and domestic really onboard or will a parochial interest block success?
- Are the authorizing parties in the Executive and in Congress prepared to live with the consequences if the mission fails?

If, as discussed in Chapter 2, timing is critical to successful preemption, then mechanisms to answer the questions above should be established now. A blanket Executive or Congressional authorization is neither likely nor necessary; however, an established framework and early sharing of critical intelligence with key Executive and Legislative leaders will be necessary to accelerate the authorization process. Involving key Congressional leaders will reduce the possibility of inappropriate or unwarranted use of force when other effective means are available. Preemption should not be considered if the answer to the first question above is not unreservedly affirmative.

A note of caution: if the decision is taken to preempt, the time for political debate is over. The action taken must be success-oriented and not unduly constrained by politics. Preemption does not require abandoning rule of war concepts such as proportionality and concern for collateral damage, but the balance must be biased toward success.

## **Preemption and Foreign Policy Issues**

Since the Middle Ages, scholars have used two paradigms to describe relations among sovereign nations. The rationalist paradigm views states as citizens in an international society regulated by International Law. The realist paradigm views states as independent power centers acting in their own self interest to maximize national security<sup>7</sup>. Recent U.S. foreign policy has been predominantly rationalist. Military force never has been the preferred foreign policy tool and usually has been the last resort when all other means have failed. Preemption usually is characterized as a tool of the realist, a form of gunboat diplomacy. If a rationalist foreign policy has served the U.S. well for fifty years, should we abandon it now? We think not, but argue instead that, in specific circumstances where U.S. citizens and institutions are threatened by rogue states, terrorists or criminals, the rationalist approach is unlikely to succeed and resort to use of force may be necessary. What are the rationalist arguments against the use of force and why do they not pertain when dealing with these threats?

## **The Evolving Concept of Sovereignty**

The principle argument against the use of force in international relations has been the doctrine of non-intervention and the inviolability of sovereign territory.<sup>8</sup> The argument relies heavily on the traditional concept of sovereignty. That concept has been evolving for centuries since the Treaty of Westphalia first codified some of its important aspects, but until the twentieth century, the empirical description of a sovereign state changed little: well defined geographic boundaries, a state government which exercised absolute

control within those boundaries, and independence in international relations. Now that understanding has been stood on its head. States which fulfill all of the empirical requirements, such as Taiwan, have been stripped of sovereignty while sovereign status is conferred on quasi-states, such as the former Muslim government of Bosnia-Herzegovina, which fulfilled none of the requirements.<sup>9</sup>

Even when sovereigns met the empirical rules of statehood, rights and responsibilities which devolved from that status were much debated. In the last fifty years, wholesale recognition of former colonies and other newly independent political entities as sovereigns has devalued the concept of sovereignty or, at the very least, created a caste system of actors on the international stage. Traditionally, sovereigns were expected to act in their own interest, but within certain bounds or “rules of the road.”<sup>10</sup> Some of the rogue actors on today’s world stage are either unwilling or incapable of ensuring that their citizens do not violate the “rules of the road.” Until now, the U.S. and other major powers have been generous in their tolerance of rogue behavior, probably because the behavior did not impact directly on our security. The proliferation of WMD and other highly destructive technologies has changed the game. The unruly child now has a gun.

If a sovereign state cannot or will not comply with the accepted norms of behavior in international relations, sovereign rights may be suspended and other states empowered to intervene in the internal affairs of the offending state.<sup>11</sup> On the other hand, if the international community cannot agree to formal sanctions against a rogue state, or there is clearly insufficient time for sanctions to be effective, then unilateral action by a threatened state might be justified under the doctrine of “self help.”<sup>12</sup>

The United Nations, which is the embodiment of the rationalist paradigm, has been trying since the terrorist attack at the 1972 Munich Olympics to pass a resolution condemning states which support terrorism. Little progress has been made or is expected<sup>13</sup>. WMD proliferation, terrorism and international crime also have been addressed repeatedly at the UN with similar lack of progress; however, this does not mean that the efforts of the U.S. and other concerned delegations should not continue. Debate in the UN serves to highlight U.S. concerns and may lead to formation of coalitions supporting more effective actions. More important, resolutions passed by the Security Council and judgments of the International Court of Justice (ICJ) can be used to justify "self help" when international consensus cannot be achieved. Any contemplated preemption would be more tolerable to the international community if supported by a UN resolution or ICJ judgment, but we must recognize that resolutions are not a substitute for action. The UN has no enforcement capability, so even the strongest condemnation of terrorism still will require that the U.S. be prepared to strike when appropriate.

### **Dialogue Between Sovereigns**

Direct negotiation, sometimes mediated by a third party, has achieved some success in reducing the threat posed by proliferation of WMD, but diplomatic attempts to reduce the threat to U.S. national security posed by rogue states, terrorists and transnational criminals have been stymied by the fact that in most cases no effective avenue for dialogue exists. In the case of terrorists and criminals, establishing diplomatic channels may be impossible. Establishing formal or informal relations with rogue states, while problematic, is not impossible, but the current situation with respect to Iran, Iraq,

Libya, Cuba and North Korea has hindered productive discussion. In the absence of dialogue, or when a situation has reached a critical stage, then unilateral action -- either preemptive or retaliatory -- is one of the few remaining options. Given the destructive potential of the threats, retaliation after absorbing a first strike is not a desirable course of action when preemption is a viable option.

## **Foreign Policy Summary**

Although rationalist on most issues, U.S. foreign policy always has included a realist streak, particularly when the lives and freedom of American citizens have been threatened. Since the Barbary Pirates goaded us into our first foreign intervention, the U.S. has been unwilling to negotiate at gun point. Our Ambassadors to the UN and others have tried earnestly to forestall the threat to world peace represented by WMD. Nonproliferation treaties, nuclear test bans, chemical and biological treaties and sanctions against terrorists all have been pursued to reduce the world wide threat. Countries which refuse to join in the effort or who actively oppose restraints must understand that the U.S. has always reserved the right to act unilaterally to protect its vital interests.

Decision makers considering preemption should ask if there is any reasonable expectation that diplomacy can achieve the desired end?

In most cases, the potential international reaction to U.S. preemption will be a factor in the decision and, depending on the specific scenario, diplomatic action may be necessary to ameliorate the negative impact on other foreign policy goals. The international response to U.S. preemption will vary based on the location of the action, the parties acted against and the relationship of the respondent to the targeted actors. A

preemption on the high seas against stateless terrorists is unlikely to elicit any response except from those who sponsor the terrorists. On the other hand, preemption directed against a sovereign or against non-state actors on the territory of a sovereign could provoke a strongly negative international response. Security and timing constraints may not permit coalition building, but the preemption plan must include a well-coordinated diplomatic effort which addresses the concerns of allies and other friendly states in the region and deters potentially hostile states from retaliating.

As we made clear earlier, we think preemption will be rare, and should always be narrowly focused. Too frequent use would almost certainly erode international support for U.S. policy and also could encourage additional attacks on U.S. vital interests. Decisionmakers should ask: will the preemptive action being considered undermine long term U.S. interests or erode international support for U.S. policy?

Through support for the United Nations and regional bodies such as the Organization of American States, the U.S. has encouraged respect for international law and the sovereign rights of members in a society of nations; however, respect for sovereign rights does not equate to unlimited tolerance for regimes which violate the norms of acceptable behavior. Neither does preference for peaceful resolution of conflicts require that every possible diplomatic avenue be explored before considering force as an option.

### Chapter 3 Endnotes

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- <sup>1</sup> The White House, *A National Security Strategy of Engagement and Enlargement* (Washington: Government Printing Office, 1996) i.
- <sup>2</sup> U.S. Office of the Secretary of Defense, *Proliferation: Threat and Response* (Washington, D.C.: Government Printing Office, 1996) iii.
- <sup>3</sup> U.S. Office of the Secretary of Defense 47-63.
- <sup>4</sup> The White House 15.
- <sup>5</sup> The White House 15.
- <sup>6</sup> Roy Godson, Ernest R. May, and Gary Schmitt, eds., *U.S. Intelligence at the Crossroads-Agenda for Reform*, (Washington: Brassey's, 1995) 177.
- <sup>7</sup> Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press 1990) 39
- <sup>8</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, Inc., 1977) 86-108.
- <sup>9</sup> Jackson 21-26.
- <sup>10</sup> Jackson 34-40.
- <sup>11</sup> UN Security Council Resolutions 731 and 748 which prohibit commercial air travel to and from Libya because of Libya's failure to comply with international norms regarding the safety of civilian airliners.
- <sup>12</sup> John F. Murphy, *The United Nations and the Control of International Violence* (Totowa, NJ: Allanheld, Osmun & Co. Publishers, Inc 1982) 186-190. Self-help was one argument used to justify Isreal's 1976 raid on the airport at Entebbe, Uganda. UN Ambassador Chaim Herzog argued that Article 2(4) of the UN Charter does not "prohibit use of force which is limited in intention and effect to protection of a state's own integrity and its nationals' vital interests, when the machinery envisaged by the United Nations Charter is ineffective in the situation".
- <sup>13</sup> Murphy 175-205

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## Legal Issues

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### Scope

The use of preemption can meet the standards set forth in existing international law; however, international law is in need of revision to remain relevant in the world today. In this chapter we will explore the dimensions of United Nations Article 51, demonstrating that it was not drafted to cover situations involving preemption and that the Article's provisions are not relevant to contemporary circumstances. Second, we contend that preemption has a legal basis in customary international law, but that the United States, as the "indispensable" nation, must take the lead in advancing customary law, updating applicable international treaties such as the United Nations Charter to make them more relevant to challenges faced by nations today.

### Article 51, U.N. Charter

On April 14, 1986, and June 27, 1993, the United States used military force against Libya and Iraq respectively. The justification for military action against Libya was described in an address to the nation by President Reagan, who said, "...Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight -- a mission fully consistent with Article 51 of the United Nations Charter."<sup>1</sup> The justification

for military action against Iraq on June 27, 1993 was detailed by United States' ambassador to the United Nations, Madeline K. Albright when she said, "...The attack was authorized by Article 51 of the United Nations Charter, which specifically permits the use of force in self-defense."<sup>2</sup> United Nations Article 51 authorization was legally sufficient in these situations; the expressed language of Article 51, however, creates an onerous burden on the victim state that is intolerable considering the proliferation of weapons of mass destruction and terrorist activities in the world today.<sup>3</sup>

Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The now antiquated language of Article 51, adopted in 1945, was to specifically provide for the use of regional arrangements and agencies for collective self-defense without requiring approval of the Security Council.<sup>4</sup> Judge Schwebel of the International Court of Justice wrote, "Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defense but of clarifying the position in regard to collective understandings for mutual self-defense, particularly the Pan-American treaty known as the Act of Chapultepec."<sup>5</sup> Article 51 has been used in conjunction with Article 2(4) to act as a bar to the use of force until the condition precedent set forth in Article 51 has been met. Article 2(4) requires nations to "refrain in their international relations from

the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.”<sup>6</sup>

### Must We Take The First Hit?

In Article 51, a preexisting condition to the use of force in self-defense is the occurrence of an “armed attack”. The phrase “armed attack” has generated great debates among legal scholars.<sup>7</sup> When Article 51 was crafted in 1945, World War II was just ending and the era of the atomic bomb and other weapons of mass destruction with delivery systems was just beginning. At that time, neither the shear destructive potential nor the proliferation of weapons of mass destruction were foreseeable by the drafters of Article 51. They could neither have foreseen nor comprehended that by 1995, “Of the 185 states with membership in the United Nations, 8 or more have nuclear weapons, 20 or more have chemical weapons, 8 to 10 or more possess biological weapons, and 18 or more deploy ballistic missiles.”<sup>8</sup>

The viability of a nation may be in jeopardy if required to sustain an “armed attack” prior to initiating self-defense measures, whether they be offensive or defensive. The Atomic Energy Commission in its first report to the Security Council submitted the following passage:

“It is . . . clear that an “armed attack [“] [as used in Article 51] is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define “armed attack” in a manner appropriate to atomic weapons, and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.”<sup>9</sup>

The failure of the United Nations to take into account the proliferation of WMD and terrorist activities leaves nations in peril of taking a first strike without a reasonable legal remedy. Mark Baker notes, “Such a requirement, in an era of atomic bombs and advanced methods of delivery, would turn the Charter into a suicide pact.”<sup>10</sup> Based on the history of the Security Council with the power of veto vested in the member nations, one must question whether or not the Security Council will act in a timely manner to guarantee a nation’s security. Consequently, national security must rise to the forefront in decisionmaking thereby requiring an examination of anticipatory self-defense in the form of a preemptive action.<sup>11</sup>

The use of preemptive action has generated debate over the connotation associated with “armed attack” and has polarized legal scholars. One group argues a restrictive literal definition, narrowly construing “armed attack” to occur only when a large military force has taken overt action against the sovereignty of a nation state.<sup>12</sup> The obvious fear of this group is that an aggressor state could use the deceptive claim of self-defense to initiate hostilities when in fact their claim of self-defense is only a pretense to commence aggression.<sup>13</sup> The foundation of this group’s argument is the linear warfare perspective of the two World Wars. But linear war no longer adequately describes contemporary circumstances.

The concept of linear warfare with clear demarcation lines between opposing nations or forces is no longer relevant to warfighting capabilities available in the global community of today. As Franck notes:

The great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized

incursions of large military formations of one state onto the territory of another, incursions usually preceded by mobilization and massing of troops and underscored by formal declarations of war. Because it was so familiar to them, it was to aggression of this kind that the drafters of Article 51 addressed themselves. Modern warfare, however, has inconveniently by-passed these Queensberry-like practices. It tends, instead, to proceed along two radically different lines, one too small and the other too large to be encompassed effectively by Article 51.<sup>14</sup>

The other group of legal scholars argue the expansive interpretation, that of reasonable use of force in anticipatory self-defense (what we call preemption) when necessary to protect a national security interest.<sup>15</sup> In this view, a literal restrictive interpretation places unreasonable constraints on a nation to legitimately respond to aggression.<sup>16</sup> "The expansivists point out that under a truly literal interpretation of Article 51, preemptive actions against even a clearly imminent attack are not permitted."<sup>17</sup> Obviously, the failure to take preemptive action against a clearly imminent attack would be contrary to our national security.

The conclusions likewise are obvious. The proliferation of weaponry to rogue state and non-state actors encourages preemptive action while it is still militarily feasible.<sup>18</sup> The threat of terrorist activities and bombings pose a threat to national security such that we cannot wait for an act to take place when we have the capability to preempt such action. Some events such as the bombings of Khobar Towers in Saudi Arabia, the World Trade Center in New York, the Pan Am Flight 103 bombing at Lockerbie and the Marine Barracks in Lebanon are but a few examples of where American lives were lost. If the United States possessed adequate foreknowledge of these plans, preemption would have

been justifiable at some point. Must Americans bear the burden of an overly restrictive interpretation of Article 51?

The language of Article 51 is archaic when used to analyze the threats to current national security. Article 51 was originally placed in the charter for clarifying understandings for collective self-defense.<sup>19</sup> Legal scholars have written to amend Article 51 so as to encompass greater flexibility and legal rights to thwart aggression.<sup>20</sup> In the alternative some of the scholars have focused on the language of “Nothing in this charter shall impair the inherent right of individual. . . self-defense. . .”<sup>21</sup> The factor of “inherent right” in customary international law was addressed by the Court in *Nicaragua v. United States of America*, where it stated:

The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. . . . Moreover, a definition of “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defense, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law.<sup>22</sup>

The International Court of Justice’s important finding that Article 51 does not supervene customary international law widens the legal theory under which preemption may be justified legally. The court’s analysis leads to customary international law as the appropriate model by which preemption should be measured.

## Customary International Law

The customary law on preemption is founded on the *Caroline* incident.<sup>23</sup> *Caroline* stands for a nation-state's right of self-defense against aggression originating in another nation-state to include the use of force as a preemptive action.<sup>24</sup> The Caroline incident arose during the insurrection in Canada in 1837. The Caroline, a small steamer, was used to ferry men and equipment from Buffalo, New York to insurgent camps on Navy Island and Black Rock Island in the Niagara River. From these islands, renegade attacks were launched against Canada. British troops crossed the Niagara River to the Caroline's berth at Schlosser, New York. The British troops boarded the steamer and attacked the crew with muskets, swords and cutlasses, then set the Caroline adrift over Niagara Falls. The result of the battle and destruction of the ship resulted in a number of American citizens being killed or injured.<sup>25</sup>

In regard to protests by the United States, Mr. Fox, the British minister at Washington in 1838, responded that the destruction of the Caroline was an act of necessary self-defense.<sup>26</sup> Subsequently in 1842, after an exchange of memoranda between the United States and Great Britain, Secretary of State Daniel Webster admitted to Lord Ashburton that the use of force might have been justified by the necessity of self-defense where exceptions "should be confined to cases in which the 'necessity of that self-defense is instant; overwhelming, and leaving no choice of means, and no moment for deliberation.'"<sup>27</sup> "In sum customary law accepted and permitted reasonable and necessary acts of self-defense premised on a compelling threat and an overwhelming necessity to act."<sup>28</sup>

The *Caroline* case stands for the general proposition that a nation may take preemptive action in anticipation of aggression being levied against a vital national security interest. The elements included in the 1842 letter by Secretary Webster, i.e., “instant, overwhelming, and leaving no choice of means, and no moment for deliberation,” need to be interpreted for relevancy today. In the last one hundred and fifty plus years, the global scene has changed dramatically with the introduction of WMD, intercontinental ballistic missiles, transnational acts of terrorism, the permeability of national borders, the transnational mobility of people, goods and information, and instantaneous global communications. The guiding principle of *Caroline* in customary international law is the right to act in advance using the justification of self-defense, rather than on limitations to the right to self-defense.<sup>29</sup>

Comparing the restrictive approach to the consequences of WMD threats, Marshall Silverberg wrote:

A better approach that seems to be gaining acceptance among scholars allows the use of force in anticipatory self-defense when a state reasonably perceives a significant threat to its national security and responds to that threat in a reasonable manner. Determination of whether a perception of a threat is reasonable requires a subjective analysis of whether the state itself actually perceives the threat and an objective analysis of whether third party states would view the threat in the same manner. Determination of whether a response is reasonable requires an objective analysis of whether the force used to counter the threat is proportional to the threat and narrowly tailored to its elimination.<sup>30</sup>

The test by third parties of reasonableness will be tested after the fact, since the decision to implement preemptive action is a “political, not a judicial, decision.”<sup>31</sup> There must be a reasonable determination that a real danger to our national security exists which

has yet to be carried out. As Rex Zedalis notes, "To require a threatened state to refrain from acting until an external danger becomes imminent seems justifiable in humanitarian terms only if the very existence of the danger were not certain."<sup>32</sup> As Secretary of State George Shultz stated in 1984 in a speech on terrorism:

The public must understand *before the fact* that occasions will come when their government must act before each and every fact is known-and the decisions cannot be tied to the opinion polls. . . . If we are going to respond or preempt effectively, our policies will have to have an element of unpredictability and surprise. . . . There will not be time for a renewed national debate after every terrorist attack. We may never have the kind of evidence that can stand up in an American court of law. But we cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond.<sup>33</sup>

When deciding whether to act, how may a policy maker determine if the contemplated preemptive action is reasonable?

### Evaluating Reasonableness

The test of reasonableness under the known circumstances will have to withstand national and international scrutiny for necessity and proportionality.<sup>34</sup> Necessity will be determined by the totality of circumstances that brings the decisionmakers together for a consideration of preemptive action. Factors such as the (1) aggressors' history of rhetoric and previous actions, (2) capability to employ, deploy a weapon or destructive agent, or capability to execute an attack, (3) alignment of factors which would allow an adversary a favorable opportunity for employment of a weapon or attack, (4) overt or covert actions by an aggressor that are observable or detectable indicating intentions to employ, deploy a weapon or destructive agent, or for the commencement of an attack, and (5) subjectively

determining the intentions of the aggressor's resolve to cause harm. Generally the ability to meet the burden of necessity will exceed a mere preponderance of evidence criteria, yet will be less than the standard of beyond a reasonable doubt.

The burden of establishing necessity must be balanced against the risk of mistake. To the extent which mistake is minimized, the use of preemptive action, even long before the threat becomes imminent, is justifiable.<sup>35</sup> Zedalis wrote, "The effect of defensive action against a distant future threat suggests the level of certainty required to justify such can be stated as that of reasonable certainty. Reasonable certainty is preferable to any purely subjective standard (e.g., 'honest belief' of attack), since it guards against instances in which states may wish to act just because they feel threatened."<sup>36</sup>

In the use of preemptive action, proportionality of the response must be linked to the necessity for action. The Restatement (Third) of *Foreign Relations Law of the United States* states, "Necessity may justify prompt action, but such action may not exceed the bounds of proportionality and should cease when it is no longer necessary."<sup>37</sup> Proportionality in preemptive action must have a nexus between the magnitude of action and the objective of the action.<sup>38</sup> The legal issue of preemption proportionality will be judged on a world stage by how reasonable it appears. Reasonableness will be judged by the extent to which preemption is limited to eliminating the danger while minimizing any collateral damage.<sup>39</sup>

In the final legal analysis, when deciding to preempt, the decisionmaker should evaluate how reasonable the preemption action is relevant to the threat it prevents, and to the level of intended destruction. As indicated above, Article 51 is outdated and when drafted, was not intended to deal with aggressors, either state or non-state actors,

possessing WMD. The U.S. should undertake a amendment to the United Nations Charter that is relevant to the threats faced by member nations today. The failure to deal with these issues dilutes the power of the United Nations as an international organization and directs states toward customary international law. Customary international law is in a slow transition and the United States needs to take the proponency to redefine the legal standard. As Norman Feder wrote, “As is often the case in a redefinition of customary international law, a state must galvanize international opinion and assert a new legal standard through its state practice, transforming what has previously been widely accepted but illegal behavior into a newly established norm of customary law.”<sup>40</sup>

Decisionmakers considering the legality of preemption should ask the following four questions. First, is there sufficient factual basis to determine to a reasonable certainty that the threat has achieved or is near to achieving the capability to deploy or employ a weapon or destructive agent/action? Second, are there indications of reasonable certainty that if not preeempted, a weapon or destructive agent will be employed or deployed? Third, is there sufficient evidence to determine to a reasonable certainty that the threat’s history and rhetoric make it likely that the U.S. or its vital interests will be a target? Fourth, are planned preemption actions reasonable and proportional to the threat posed? A determination of legal sufficiency will aid in illuminating the ethical and moral issues of preemption.

## Chapter 4 Endnotes

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- <sup>1</sup> Address by President Ronald Reagan, *The Fight Against Terrorism, United States Foreign Relations with Libya*, Delivered to the American People, Washington D.C., April 14, 1986, reported in (Vital Speeches of the Day, May 1, 1986) Vol. LII, NO. 14.
- <sup>2</sup> Richard Bernstein, "Raid on Baghdad: The United Nations," *New York Times*, June 28, 1993: A7.
- <sup>3</sup> In the 1986 Libya raid, the General Assembly of the United Nations issued a resolution supported by seventy-eight members who condemned the attack. The United States, Britain, France, Australia, and Denmark vetoed a Security Council resolution condemning the United States. Stuart Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, (24 GA. J. INT'L & COMP. L., 1994) 106n42 .
- <sup>4</sup> Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, (10 Houston Journal of International Law, 1987) 30.
- <sup>5</sup> Judge Schwebel's dissenting opinion in *Nicaragua v. United States of America* ([1986] I.C.J. Rep.) 3, 348; citing C.H.M. Walcock, *The Regulation of the Use of Force by Individual States in International Law*, (Collected Courses, The Hague [1952-II]) 496-497.
- <sup>6</sup> See U.N. CHARTER art. 2, para 4.
- <sup>7</sup> See Generally, Marshall Silverberg, *International Law and the Use of Force: May the United States Attack the Chemical Weapons Plant at Rabta?*, (13 B.C. INT'L & COMP. L. REV., 1990) 53; Whiteman, *Permissible and Impermissible Uses of Force*, (12 M. Whiteman Digest of International Law, 1971) 42;
- Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, (10 Houston Journal of International Law, 1987) 25; Anthony Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, (27 STAN. J. INT'L L., 1990) 1; and Baker, *Comparing the 1993 U.S Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, (24 GA. J. INT'L & COMP. L., 1994) 99.
- <sup>8</sup> Barry R. Schneider, *Radical Response to Radical Regimes: Evaluating Preemptive Counter-Proliferation*, (Institute for National Strategic Studies, National Defense University, McNair Paper 41, 1995) 5.
- <sup>9</sup> Whiteman 45.
- <sup>10</sup> Baker 45.
- <sup>11</sup> Silverberg 57.
- <sup>12</sup> See Norman Feder, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, (19 N.Y.U. J. INT'L L. & POL., 1987) 402-12; See also Whiteman, 48.
- <sup>13</sup> See generally Stuart Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, (24 GA. J. INT'L & COMP. L., 1994) 99, (explaining restrictive view that aggressor state could characterize pre-emptive strike in self-defense against some possible future threat posed by the other state, then Article 51 would justify the aggression); Feder, 404, (explaining "restrictive approach addresses the fear that expansive interpretations of Article 51 create a loophole through which various countries could rationalize military adventurism."); Ian Brownlie, *International Law and the Use of Force by States*, (Oxford University Press, 1963) 275, ("The Article [51] states that the right of self-defence remains unimpaired 'if an armed attack occurs against a Member of the United Nations'. It is believed that the ordinary meaning of the phrase precludes action which is preventive in character.)
- <sup>14</sup> Feder, 413 quoting Franck, *Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States*, (64 AM. J. INT'L L., 1970) 812.
- <sup>15</sup> Silverberg 58.
- <sup>16</sup> Stuart Baker 109.
- <sup>17</sup> Baker 109;. See also Feder 408.
- <sup>18</sup> Silverberg 58.
- <sup>19</sup> Judge Schwebel 348.

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<sup>20</sup> See Baker 48, ("Article 51 needs to be re-written, or its terms specifically defined so as to allow for the use of self-defense in response to terrorism. Specifically, out-dated notions of the term "armed attack" need to be replaced with a definition which fits reality."); Myres S. McDougal and Florentino P. Feliciano, *The International Law of War: Law and Minimum World Public Order*, (New Haven Press, 1994) 238, ("The second major difficulty with a narrow reading of Article 51 is that it requires a serious underestimation of the potentialities both of the newer military weapons systems and of the contemporary techniques of nonmilitary coercion. If, in scholarly interpretation of authoritative myth, any operational reference is seriously intended to be made to realistically expected practice and decision, an attempt to limit permissible defense to that against an actual "armed attack," when increases in the capacity of modern weapons systems for velocity and destruction are reported almost daily in the front pages of newspapers, reflects a surpassing optimism."); Arend, 29, (arguing to add anticipatory self-defense and reprisal to the list of situations giving rise to permissible unilateral force in Article 51); Jeffrey McCredie, *The Aril 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, (19 CASE W. RES. J. INT'L. L., 1987) 228, ("The right of nationals to exercise self-help measures includes the right of self-defense under Article 51 of the Charter, and limited intervention in affairs to enforce legal norms."); Stuart Baker, 116, ("There is a great opportunity here for the civilized nations of the world to use a broadened interpretation of Article 51 to combat and defeat the forces of terrorism in all of its insidious forms.").

<sup>21</sup> Judge Schwebel, 376, (arguing about the reporting requirement of Article 51 wrote, "All this said, there remains, under the Charter of the United Nations, a literal violation of one of its terms. The term in question is a procedural term; of itself it does not, and by the terms of Article 51, cannot impair the substantive, inherent right of self-defence, individual or collective."); Derrek Bowett, *Self-Defence in International Law*, (Manchester University Press, 1958) 186, ("It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter."); Mark Baker, 32, ("These views suggest that the right of self-defense under Article 51 remains the same as it did under international law, prior to the adoption of the Charter. Under prior international law, the right of self-defense was judged by the standard enumerated in the case of *The Caroline* in 1837."); Silverberg, 58, ("Consequently, scholars have begun to reject the unduly restrictive requirement of an armed attack under Article 51 and have instead started to return to the pre-Charter customary law formulation of anticipatory self-defense."); Feder, 396, (arguing that traditional definitions of self-defense are inadequate and "an alternative legal understanding of modern hostile state behavior, one that is poised on becoming, if it has not already, a part of customary international law.").

<sup>22</sup> *Nicaragua v. United States of America*, ([1986] I.C.J. Rep) 94.

<sup>23</sup> See John Moore, 2 Moore, *A Digest of International Law* 409, (1906); Baker 32; Silverberg 58; McCredie 232; Rex J. Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, (19 CASE W. RES. J. INT'L. L., 1987) 129; McDougal and Feliciano 231.

<sup>24</sup> Guy Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, (19 CASE. W. RES. J. INT'L. L., 1987) 269; See also McCredie 230; Zedalis 129; Baker 32

<sup>25</sup> Moore 409.

<sup>26</sup> Moore 410.

<sup>27</sup> Moore 412; Letter from Secretary of State Webster to Lord Ashburton, British plen., August 6, 1842.

<sup>28</sup> Roberts 271 citing 12 M. Whiteman 47; M. McDougal & F. Feliciano 231-32.

<sup>29</sup> Zedalis 145.

<sup>30</sup> Silverberg 58-59.

<sup>31</sup> Restatement (Third) of *Foreign Relations Law of the United States*, (Volume 2, section 905, 1987) 383.

<sup>32</sup> Zedalis, 147; See Roberts, 259 n.72, "Not only is it difficult from an intelligence perspective to obtain the necessary evidence, the degree of proof is so great that, except in obvious cases, the use of military force would always be ruled out. Consequently, if a state desires to keep the use of force option open, a lesser standard, of necessity, must prevail."

<sup>33</sup> Address by Secretary of State George Shultz, *Terrorism and the Modern World*, (United States Department of State Bureau of Public Affairs, Current Policy No. 629, 1984) 5-6.

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<sup>34</sup> McCredie 230.

<sup>35</sup> Zedalis 146.

<sup>36</sup> Zedalis 151.

<sup>37</sup> Restatement (Third) *Foreign Relations Law of the United States*, (Volume 2, section 905, 1987) 387, Reporter's Note 3.

<sup>38</sup> McDougal & Feliciano 242.

<sup>39</sup> Baker, 47; See also Silverberg, 277, ("Proportionality is closely linked to necessity as a requirement of self-defense. Acts of self-defense must not exceed, in manner or aim, the necessity provoking them."); McCredie, 230, ("Proportionality is the measurement of the threatening attack or attack against the forced used to repel or deter future action by the threatening state.").

<sup>40</sup> Feder 432.

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## Ethical and Moral Issues

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### Scope

Any democratic government considering preemption will, at some point in its deliberations, consider the ethical and moral dimensions of its potential courses of action. Here is the critical question: Does a country whose vital interests are at risk of suffering a severe blow have the moral right to destroy that which threatens the interests before it suffers the loss? And there are other questions which need answers along the way. Exactly what role do ethics and morality play in international relations? Should we worry about the ethical dimensions or implications of preemption? If so, what priority should ethical thinking take in our decision scheme? Should the justification be aimed at a domestic or international audience, or both?

These are difficult questions. Given the volumes written about ethics and morality in state affairs, it would be practicably impossible for us to provide a complete moral framework or a discussion favoring or denying preemption as a policy option; indeed it is well beyond our scope to do so. What is more appropriate here is to explore the "moral horizon," for practical insights, cautions, and guidelines benefiting policy makers involved in security decisions and actions.

## **Relevance of Ethics and Morality in International Affairs and Preemption**

Preemption, carefully considered and applied, can conform to ethical standards and thus can be morally justified. Preemption is ethically and morally defensible. But are ethics and morality even relevant to the preemption question? The answer is yes. Most of us -- our leaders included -- agonize over moral questions because we are moral beings by nature.<sup>1</sup> Vigorous discussion and exploration of ethical and moral issues relevant to preemption will be vital to initial consideration, and then to eventual and inevitable justification efforts in any scenario. Americans certainly will judge at some level, either consciously or viscerally, whether actions taken on their behalf are just, and foreign governments will demand public justification for American actions abroad, especially preemptive actions.

On the other hand, some would argue that there is no room for an emoting, idealistic sense of morality, ethics or fair play in the arena of world politics. There may be instances when this viewpoint is valid, but politics is an arena where power and conscience meet.<sup>2</sup> The convergence of power and conscience in national security affairs is particularly and pointedly relevant when political power is manifested in the preemptive use of force. It is in politics where preemption would be explained and justified to domestic and foreign audiences. Politics is an extension of ethics.<sup>3</sup> Stanley Hoffman asserts “the problem of the use of force is central to the subject of ethics.”<sup>4</sup>

In any case, no American policy maker could afford to conform literally and absolutely to a “real-politik” perspective, regardless of how idealistic or emoting an ethical argument might appear. “At a minimum, interesting foreign policy questions almost

always raise questions about the abilities of leaders to redeem the trust of the people they serve, and most raise much broader questions than this. Thus, it is natural for us to hold our leaders to certain minimal standards (spoken or unspoken) of ethical conduct in international affairs," observes David Welch.<sup>5</sup>

When facing an immediate threat, it is unlikely a decision to use preemption would hinge primarily on moral judgment, but it is important that policies from which such decisions flow have strong, defensible moral foundations and attributes. International use of preemption will instantly open the door to ethical judgment. Favorable ethical judgment rests on the possibility of justification.<sup>6</sup> Sufficient and acceptable ethical justification of preemption, in turn, will depend on how well supporting ethical arguments flow from consistent domestic and international understanding of national purpose articulated by clear and unmistakable statements of national interest. Preferably, statements of national interest would be a matter of established public record well before the need to resort to justification. Absence of an established moral foundation for preemption policy, or the appearance of an after-the-fact "ad hoc" search for a supporting moral foothold inevitably will dilute arguments favoring moral justification.

### **Role of Moral Theory and Moral Thinking in Justification of Preemption**

Preemption in any scenario will present difficult ethical and moral dilemmas. To address the dilemma, moral theory can be useful in promoting clear thinking. Moral theory helps us think systematically about ethical matters, and it helps us categorize and characterize our views toward moral reality.<sup>7</sup> Examination of and deliberation over moral theory can lead to good moral thinking.

One must balance carefully, however, the benefits and liabilities of thinking in the moral abstract. On one hand, thinking of morality in theoretical abstract often can ultimately shed light on the current problem. On the other, attempting to translate abstract moral concepts into situationally specific justification may lead to vague or impressionistic moral thinking, and this pitfall can be counterproductive. David Welch explains, "If our ethical grounds shift beneath our feet, or if we can handle trade-offs between our ethical values in a vague or impressionistic way, then the corpus of our moral judgments will be arbitrary and seem hypocritical to others."<sup>8</sup> Unfortunately, there is neither a universal ethical code nor a moral theory -- at least not understood or practiced in universally absolute terms -- on which policy makers confidently could rely to justify their actions. And in any case, moral reasoning in international affairs cannot be refined to a set of instructions to be blindly followed by any practitioner. To try to refine them to so sharp a point as to be finitely applicable or morally pure in any international situation is a futile endeavor. Welch again observes, "In general, given the diversity of ethical traditions and particular cultural commitments, the more broadly we define the group whose assent we require, the more difficult it will be to justify our actions, and the weaker and more abstract our operative ethical foundations will be."<sup>9</sup>

There is a tendency to regard ethics as absolute and enduring, yet they are neither.<sup>10</sup> We are not bound to remain helplessly and hopelessly entangled by ethical prescriptions which are inadequate to guide us in contemporary circumstances. If seemingly radical actions such as preemption need to be justified, ethics, moral theory and moral reasoning must evolve, or rather be forced to evolve, both to keep pace with and be

reconciled to contemporary circumstances. But this won't happen by chance; evolution of ethical thinking must be nurtured by its users if it is to serve them.

"Just war" theory, for example, evolved to accommodate contemporary behavior of its time. "Just war theory...took two perfectly contradictory Christian impulses, one toward pacifism and the other toward crusades, and partly blended them, and partly restrained them both" according to Hoffman.<sup>11</sup> Just war theory evolved to provide an ethical framework for moral judgments concerning the acceptability of military force under the circumstances of its time. It attempted to define the exact conditions under which Christians morally could use armed violence. Just war theory, however, eventually became irrelevant and thus inadequate because it no longer imposed adequate restraints on the conduct of war. "It was based on assumptions derived from a totally different political and technological universe" says Hoffman.<sup>12</sup>

Likewise today similar inadequacies of restraint and control exist. The previous chapter highlighted the inadequacies of the UN Charter and customary international law which were established to govern war between sovereign nation states. "But war is no longer waged solely by nation-states. War is now a struggle among competing forms of social and political organizations" according to Robert Bunker.<sup>13</sup> And, as discussed in Chapter 3, sovereignty is eroding as incompetent emerging nations and non-state international organizations and actors emerge or ascend in importance on the international stage. As in just war theory, inadequacies exist, and a new framework must evolve to accommodate the contemporary political, ideological, and technological universe.

Where does this leave us with respect to moral thinking and justification of preemption? Decisionmakers can help their own cause, though admittedly it is neither the

responsibility nor necessarily the province of policy makers to advance moral theory to accommodate contemporary circumstances. It is to their advantage, though, to advance public opinion on current moral thinking aimed at illuminating policy-relevant issues in a light favorable to their views. Doing so could promote necessary broader consensus, and would at least educate and alert those who do not share ethical consensus. Public discussion and debate could also stimulate development of a new moral framework which will accommodate moral aspects of evolving contemporary international relations.

### **Balancing Domestic and International Views on Morality**

States derive their authority from two sources: One is international society, and the other is domestic society.<sup>14</sup> We think it necessary then to consider the moral dimensions of international policy within those two societies. Domestic and international ethical concerns regarding preemption must be considered concurrently and collectively, but the two viewpoints are likely to be incommensurable: they cannot be measured by the same yardstick.

In effect, the absence of moral consensus among nations -- fundamental perceptions of right and wrong -- limits effective morality.<sup>15</sup> Vast differences in historical experience, culture, religion, ideology, value systems, political objectives, and geographic circumstances make consensus problematic.<sup>16</sup> So, whose "morality" do we use? On the domestic side the heart of the issue is the fundamental question of good and evil. On the international side, the heart of the issue is the fundamental ambiguity of foreign perceptions of good and evil. Michael Walzer explains, "Between radically separate and dissimilar cultures, one can expect to find radical dichotomies in perception and

understanding.”<sup>17</sup> Furthermore, in conflict, each side is likely to be confident of the justice of its cause.<sup>18</sup>

The natural inclination and apparent course of action is to seek greater consensus. Generally speaking, though, the more consensus one can achieve on any particular moral issue, the broader the principle is likely to be, and therefore it is likely less applicable in a specific circumstance. Conversely, the more specifically applicable a principle, the less likely one is to achieve broad consensus.

Given these apparent limitations, it would be easy to claim that leaders need only be morally responsible to their domestic audience. Requiring leaders to justify their actions only to their domestic constituency certainly would relieve them of a tough problem. “But requiring only domestic justification opens the door ... to parochialism and moral imperialism,” warns Welch.<sup>19</sup> Further, providing only domestic justification ultimately would lead to international isolation and distrust resulting in loss of influence and lack of international support, cooperation, and probably prestige.

Consequently, we believe that preemption must be viewed in light of both domestic and international moral consensus, though not necessarily shared consensus, and therefore moral justification must address both international and domestic concerns. Practically speaking, American policy cannot and will not be held hostage to any particular moral consensus, but it must answer to one. Notwithstanding possible adverse political realities, it is again clear that public discussion of the issue, with the deliberate purpose of educating domestic and international audiences to the moral issues, can help build consensus and will serve policy well.

In the end, leaders must satisfy demands for ethical responses to ethical problems, and they can only do so in a manner that addresses their basic moral commitments.<sup>20</sup> Achieving a universally applicable moral formula on preemption is unlikely, but Walzer contends “even when world views and high ideals are abandoned, notions about right conduct are remarkably consistent.”<sup>21</sup> Some level of mutual international understanding can be achieved, though perhaps not using the same logic of justification used domestically. The effective ethical justification of a particular preemptive policy likely will not hinge on whether actions stemming from that policy constitute proper ethical behavior, but whether internationally the justifying ethical argument successfully satisfies legal stipulations for self defense, and domestically on concise articulation of the risks posed by the threat versus the consequences of not acting.

### **Morality and International Law**

If there is a point of convergence for agreement between national and international views of morality, it is likely to be within the realm of international law. “When ‘Just War’ thinking perished as a useful theory for examining war, it was absorbed into a new tradition centered on international law, contends Peter Faber.”<sup>22</sup> To the extent that international relations are guided by international law, and that international law represents codified rules of customary and traditional practices between nations, international law provides a useful starting point for examining possible ethical and moral viewpoints of other nations. A note of caution is necessary though; often a given tradition, even when codified, will not yield a clear or universal perspective of a moral question.<sup>23</sup> Nevertheless, use of force between nations is governed by international law, and so

international views of preemption inevitably must be viewed morally at a minimum through the lens of international law. While the preceding chapter provides a thorough analysis and discussion of the international legal views of self defense, the following discussion relates that analysis to morality and ethics.

Morality and international law complement each other where use of force is concerned, and, with respect to WMD, neither international law nor traditional moral constructs are well-suited to deal with modern threats. In the abstract, almost certainly the most ethically and morally pure motive for which a state may use force against another state is self defense. In practice, international law and the UN charter stipulate that self defense is morally acceptable only under certain conditions. It must be a self defense against an armed attack or against a vital national security interest.<sup>24</sup> Also, in general, it remains true that a claim of self defense to justify a war (or use of force) on behalf of secondary interests, or against threats that can be handled effectively without resort to force is not acceptable in the current international environment.<sup>25</sup> As a consequence, law against use of force except when attacked, and then only for self defense, apparently eliminates preemption as a morally viable option.

In simple terms, the common understanding of self defense is that a nation must first wait until it is attacked before it can use force, and that its use of force must be a last resort, morally justifiable only after all other non-forceful means have been exhausted. From a moral standpoint, these appear to be simple, reasonable requirements. But in international practice, the problems are complex. Preemption, as its name implies, is not normally viewed as an act of last resort, and may, therefore, not be viewed as conforming to the rules concerning self defense (since one is acting before he is attacked). The

concepts of "self defense" and "last resort" are formidable obstacles for ethical justification of preemption.

If there is a likely point of divergence between national and international views of morality where preemption is concerned, it is likely to be on the issues of what constitutes self defense, and what constitutes "last resort?" Indeed, the UN Charter's recognition of self defense as an ethically justifiable use of force<sup>26</sup> has led to an escalation of claims of self defense, suggesting that some license has been taken in interpreting the Charter's exact meaning.<sup>27</sup> Broad guidelines result in broad interpretations. This highlights our current dilemma: what really constitutes self defense in a situation of chronic ideological and political conflict?<sup>28</sup> What contemporary moral guidelines regarding use of force sufficiently guides a state's behavior or enables adequate actions when capabilities of adversaries are so potentially destructive? And what if adversaries like Saddam Hussein and Muammar Qadhafi remain stubbornly resistant to all other non-forceful options? Our self-imposed international restrictions no longer adequately fit contemporary circumstances, as was the case with just war theory.

There is something inherently unreasonable about any moral argument which concludes that a state must risk certain disaster before it can act morally in its own defense. This is not to advocate a "shoot first, ask questions later" approach to all national security threats. But there is exceedingly weak moral justification in asking a nation to absorb a crippling blow for the sake of abstract principle.<sup>29</sup> Likewise, it is inherently unreasonable to go through the motions of exercising all options short of force when it is readily and repeatedly demonstrable that an adversary persistently shows no signs of paying serious regard to such measures. And in either case, we believe the last

resort for self defense should be defined as the point where you can best affect the outcome to your advantage with acceptable risk not, by contrast, as that point where you have symbolically and incrementally stepped through the prescribed motions for the mere sake of proving that you did so. Some will say this approach constitutes a prescription and perhaps a precedent for cavalier action. But those who fear that this will lead to irresponsible or reckless use of force shortchange both our decision process as well as decisionmakers, and argue from a perspective which is historically counterfactual. We are capable of selective and prudent judgment based on individual merits of discreet scenarios.<sup>30</sup>

International relations occur in the realm of anarchy, where no sovereign nation admits of higher natural authority. In international life, there are no organizations comparable to those which regulate domestic life.<sup>31</sup> Although there is a body of international law, in the final analysis the nation-state represents the locus of political and military power.<sup>32</sup> In the current international environment, international law is enforced only with great difficulty, and nearly always at great cost. More often than not, it goes unenforced. We continue to cling to rules of diplomacy even though they are flouted, spurned and mocked by international outlaws. We face opponents from warlords to drug lords who operate in environments of tremendous moral freedom, unconstrained by laws, internationally recognized treaties, and "civilized customs", or even by internationally approved rules for the behavior of soldiers during conflict.<sup>33</sup> Yet when dealing with rogues and transnational outlaws, we afford them the protection of rules of civility they so easily scoff. In doing so, we guarantee protection of international laws to criminals who shamelessly hide behind them. We question our right to act in self defense, and so we

hesitate. Our hesitation to act on our own behalf provides license and time to adversaries to continue threatening our vital interests in increasingly threatening ways.

Morality and law exist for us, not we for them. We can't wait for the day when preemption becomes inevitable to puzzle our way through the moral and legal maze. When the day comes, our actions and their enabling policies must be clear and decisive. Preemption can be morally defended under current international law, but moral justification relative to updated international law will have greater clarity and likelihood of consistent international and domestic acceptance.

There is of course a danger that the preemption justification can be turned against the U.S. It is quite possible that such justifications for warfare will be misused by rogue nations. But we shouldn't discard an advantageous argument simply because it may be misused by an adversary.<sup>34</sup> In any case, rogue states and terrorists by their very nature act outside international norms and laws, and thus a change of those laws enabling or forbidding any action likely will not impede their actions.<sup>35</sup> The time to decide how we will handle it is now.

### **Conclusions Concerning the Moral Aspects of Preemption**

If the United States chooses to use preemption, the nation must be clear, before and after it acts, on the ethical and moral dimensions of its decision. While it is unlikely there will ever be complete domestic or international moral consensus on any international issues, especially those involving controversial issues such as preemption, we need not be held hostage to any particular viewpoint which ill serves our needs. We should not view ourselves as helpless subjects to any particular moral interpretation of preemption,

domestic or foreign. Nor should we be hesitant to discuss it merely because it is controversial. In the end it is not the mere existence of preemption as an option which gives it its moral meaning, but the way we use (or misuse) it which determines its ethical and moral standing.

In this case, the question is not whether politics should be held to a particular ethical or moral standard. Morality is not the master of mankind, it is our servant, but only if we take on the role. Politics is a most proper arena for defining and cultivating the appropriate role and viewpoint of morality. According to Hoffman, "It is through the right kind of politics that some moral restraints can become observed and practicable."<sup>36</sup>

Finally, ethics should be viewed as the enablers of action.<sup>37</sup> They allow the right action, at the right time, for the right reasons. Though with preemption, the moral choice often may appear to be "the lesser of two evils." But, the real moral choice of concern for policy makers, the one for which they are accountable, is the choice between the victim and the attacker, and between the consequences of action and inaction.<sup>38</sup> As Robert Pfaltzgraff observes, "Those who make public policy are bound primarily by the ethic of consequences rather than by the ethic of intentions."<sup>39</sup>

The day is soon coming that American politicians will need to consider preemption. Waiting for that day to ponder the ethical dimensions of the problem, while figuratively or literally under the gun, will be too late. Publicly deliberating, debating, and discussing the issue now will help build the proper ethical and moral framework for well-informed decisions. Irrespective of the final choice, investigating the possibilities and potentials, shaping the thinking, and framing the issues today guides the intellectual

trajectory of relevant moral thinking in the proper direction, and thus should make the foundation for decisions more clear.

When considering preemption, decisionmakers should ask the following questions concerning morality. Can the preemption under consideration be directly associated with or related to a clear and unmistakable statement of national interest? Can the moral tradeoffs be clearly articulated in a risk-versus-benefit explanation, i.e., will the moral consequences of not preempting appear worse than those associated with preempting? Finally, is the decision to preempt the last possible reasonable option for defense of U.S. interests without incurring untenable risk, and can it be justified in those terms?

Having analyzed our key variables, we are now prepared to apply the framework to the Libya case study.

## Chapter 5 Endnotes

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- <sup>1</sup> David A. Welch, "Can We Think Systematically About Ethics and Statecraft?" *Ethics and International Affairs* 8 (April 1994) 23.
- <sup>2</sup> Kenneth W. Thompson, *Theory and Practice in International Relations* (Maryland: University Press of America, Inc., 1987) 51.
- <sup>3</sup> George Weigel, *American Interests, American Purpose*, (Washington D.C.: Center for Strategic and International Studies, 1989) xvii.
- <sup>4</sup> Stanley Hoffman, *Duties Beyond Borders*, (Syracuse, New York: Syracuse University Press, 1981) 45.
- <sup>5</sup> Welch 23.
- <sup>6</sup> Welch 28.
- <sup>7</sup> Welch 24.
- <sup>8</sup> Welch 24.
- <sup>9</sup> Welch 29.
- <sup>10</sup> Ralph Peters, "A Revolution In Military Ethics?" *Parameters* (Summer 1996): 102.
- <sup>11</sup> Hoffman 48.
- <sup>12</sup> Hoffman 48.
- <sup>13</sup> Robert J. Bunker, "Strategy for the Blind," *Military Review*, (October 1996) 95.
- <sup>14</sup> Hoffman 55-56.
- <sup>15</sup> Thompson ix.
- <sup>16</sup> Robert L. Pfaltzgraff, *National Security: Ethics, Strategy, and Politics: A Layman's Primer*, (Cambridge, Massachusetts: Pergamon-Brassey's International Defense Publishers, February 1986) 2.
- <sup>17</sup> Michael A. Walzer, *Just and Unjust Wars*, (Basic Books 1977) 16.
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## TARHUNAH: The Libya Case Study

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### Scope

In the previous chapters, we have explained the rationale for considering preemption and the variables that we believe must, at a minimum, be considered by the decisionmaker. In this chapter we will use our four variables to examine the possible use of preemption against the chemical weapons manufacturing facility at Tarhunah, Libya. The case study uses only information that is readily available in the public domain; therefore classified intelligence and information that could be provided to a decisionmaker may alter the actual analysis of each variable. For our purposes, what is important is the process, not the decision.

### History

Libya is one of the few nations to have used chemical weapons in the last ten years. In 1987 Libyan forces using a transport aircraft dropped chemical agents on Chadian troops.<sup>1</sup> In 1987 Libya did not have the capability to produce chemical weapons; therefore they traded Soviet-made sea mines to Iran for chemical weapons.<sup>2</sup>

In 1988, the United States revealed Libya was covertly building its own massive chemical weapons manufacturing facility at Rabta. After extensive international pressure

by the United States over several years, chemical weapon production at Rabta ceased in 1990.<sup>3</sup>

Libya did not wait long before moving the geographical focus of its chemical program to a new location - a lateral displacement of its activity. In 1992 the United States intelligence community detected Libya constructing a massive underground chemical warfare plant in the mountainous region known as Tarhunah.<sup>4</sup> Libya's previous use of chemical weapons in 1987, coupled with manufacturing facilities at Rabta and Tarhunah, and Libya's stated policy that they would not sign the Chemical Weapons Convention as long as other regional countries possess nuclear, biological and chemical weapons, created not only regional instability but also global instability.<sup>5</sup>

### Rabta

Information concerning Rabta came to public attention in the fall of 1988, after diplomatic activity to force Western companies out of the project failed.<sup>6</sup> President Reagan publicly stated that he would not rule out a preemptive attack against the alleged chemical weapons factory and was "discussing" with allies the possibility of taking military action.<sup>7</sup> William Webster, then Director of the Central Intelligence, stated "the complex is the largest chemical weapon facility the agency has detected under construction anywhere in the Third World."<sup>8</sup> United States analysts believed the Rabta plant capable of producing between 22,000 and 84,000 pounds of mustard gas, a blister agent, and Sarin, a potent nerve agent, on a daily basis.<sup>9</sup>

An international debate erupted over whether Rabta was designed for chemical weapons or for manufacturing fertilizer or pharmaceuticals. Libya's leader, Colonel

Qadhafi, proclaimed that Rabta was a pharmaceutical factory. To prove his assertion, Colonel Qadhafi offered to allow a one-time international inspection of the plant. The United States rejected the offer, arguing that any evidence could be removed and Rabta made to resemble a non-chemical warfare plant during the short tenure of an international visit.<sup>10</sup>

American media investigated involvement of West German companies, particularly Imhausen-Chemie, in the construction of Rabta. President Reagan and Secretary of State George Shultz addressed German commercial involvement with West German Chancellor Helmut Kohl on November 16, 1988.<sup>11</sup> The West German Finance Ministry conducted a four-day public inquiry and announced on January 5, 1989, that there was no evidence of participation in Rabta's construction by Imhausen-Chemie.<sup>12</sup> The accusations by the United States generated some international tension. The United States offered to provide the Germans additional information in hopes of resolving the issue.<sup>13</sup>

In early February 1989, Wolfgang Schaeuble, chief of staff for German Chancellor Helmut Kohl, admitted that Imhausen-Chemie and Ihsan Barbouti International *had* directly aided Libya in building Rabta.<sup>14</sup> In addition to the work performed by West German companies, Japan Steel Works built an elaborate metallurgical plant in the same industrial park as the chemical plant. The Japanese believed their metallurgical works was for making parts for a desalting plant; however analysts concluded that the metallurgical works could make bombs and shell casings.<sup>15</sup>

The Reagan administration elected not to attack Rabta because, according to an administration source, the "prevailing consensus" held there was insufficient legal and other justification for military action. Instead, the United States pursued diplomatic efforts

to end western assistance to the building of Rabta while still gaining evidence that could justify military action.<sup>16</sup>

It is believed that because of the diplomatic pressure applied by the United States, Libya fabricated a fire to make the Rabta facility appear as if it had been severely damaged.<sup>17</sup> Today the Rabta facility, even though believed not to have been seriously damaged in the fake fire, appears no longer to be producing chemical agents.<sup>18</sup> It is estimated that during the two years of operation of Rabta, about 100 tons of mustard gas and nerve agent were produced.<sup>19</sup> Satellite imagery analysis indicated that the Rabta equipment and the existing chemical agents were moved to underground bunkers prior to the faked fire.<sup>20</sup>

### **Tarhunah**

In 1992, the United States intelligence community, relying on satellite imagery and operatives, was able to construct a computer model of Libya's follow-on chemical production plant located at Tarhunah.<sup>21</sup> Learning from the vulnerability of Rabta to air interdiction, Libya designed the plant at Tarhunah to be virtually impregnable. The entrance to Tarhunah is located in the middle of a long, narrow valley between two mountain peaks (see figure 6-1). The road network allows simultaneous side-by-side movement of two tractor-trailer trucks. Carved into the side of the mountain, it is estimated that Tarhunah houses an underground chamber of several thousand square feet and is almost three stories high. In 1996, John Deutch, then Director of Central Intelligence, stated that Libya was building the "world's largest underground chemical-weapons plant."<sup>22</sup>

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**TARHUNAH UNDERGROUND CHEMICAL PLANT**

*Figure 6-1*

*(extracted from Proliferation: Threat and Response, 27)*

In the four years following the discovery of Tarhunah, the United States embarked on a diplomatic program similar to that used against Rabta. This time, Libya established a network of false companies through which it could acquire technology and equipment to facilitate construction of Tarhunah. According to Time magazine, "CIA and State Department officials persuaded Italy, Switzerland, Japan, Denmark, Austria, Britain and Poland to halt deliveries of equipment Libya had bought from their companies."<sup>23</sup> An attempt was made by the CIA to render ineffective the large boring machines by cutting

off the supply of drilling bits from the German manufacturing company of Westfalia-Becorit. Libya was able to overcome the interruptions caused by the United States and continue construction, albeit at a slower pace. The U.S. goal, according to a U.S. intelligence source, was to slow down construction to buy time, since it is nearly impossible to stop something of this nature entirely.<sup>24</sup> In 1996, a U.S. intelligence official stated, "the Libyans are completing the boring and lining of the tunnel complex" and that installation of manufacturing equipment would follow this phase.<sup>25</sup>

In 1996, the United States went public, warning Libya that it would not allow the plant to commence operations. The United States, in addition to interrupting the flow of technology and equipment, also tried to build a coalition among Arab and European leaders to convince Libya to stop construction or, in the event that failed, to sanction military action as the final recourse.<sup>26</sup> In public statements, the Secretary of Defense did not rule out military action, but warned Libya that Tarhunah would not be allowed to open.<sup>27</sup> Harold P. Smith Jr., Assistant to the Secretary of Defense for Atomic Energy, stated that the United States did not currently have a conventional warhead to strike Tarhunah; however, there was a nuclear warhead, known as B-61, which would be capable of destroying the underground structure.<sup>28</sup> Pentagon spokesman, Kenneth Bacon informed reporters that any talk of military action was "premature," since diplomatic and economic sanctions still had to be given time to work.<sup>29</sup>

Secretary Perry presented intelligence on Tarhunah to Egyptian President Mubarak so that he was aware of the United State's assessment. By presenting the information to President Mubarak, the United States hoped that he would assist in bringing diplomatic and economic pressure on Colonel Qadhafi to cease construction.<sup>30</sup> President Mubarak

was able to have Egyptian weapons experts explore Tarhunah's tunnels. The experts reported, "there are tunnels but no installations, no equipment."<sup>31</sup> President Mubarak personally met with Colonel Qadhafi and was assured by the Libyan leader that the facility would not be fitted with chemical weapons manufacturing equipment and that the site was part of an irrigation project.<sup>32</sup> President Mubarak reportedly said that in his meeting with Colonel Qadhafi, Qadhafi suggested that Tarhunah would be used as an ammunition depot.<sup>33</sup> In August 1996, President Mubarak warned the United States against carrying out any military plans against Libya.<sup>34</sup>

In a CNN interview, Colonel Qadhafi stated that Libya and all Arabs have the right to adopt WMD because they live under the umbrella of Israeli nuclear weapons. That said, Colonel Qadhafi stated that Tarhunah is a project that belongs to the "great-manmade" river, a massive Libyan irrigation project.<sup>35</sup>

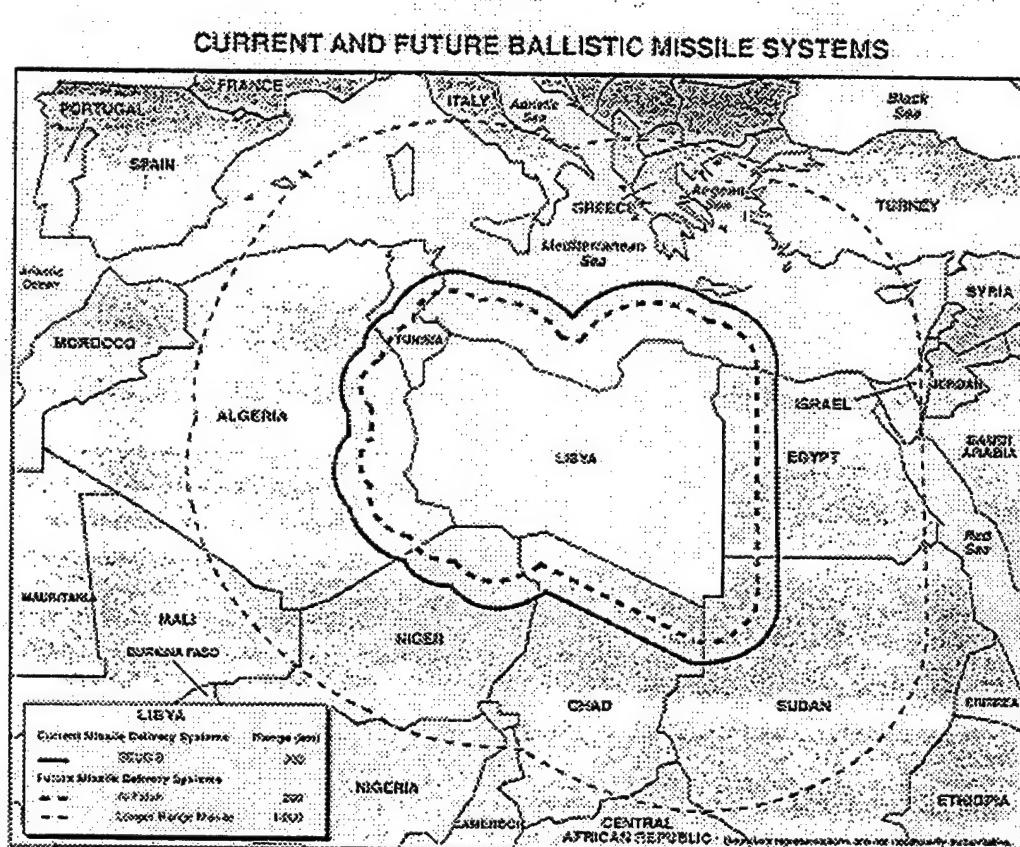
### **Other Capabilities**

Chemical weapons are only one of several known ongoing Libyan WMD programs. Despite a limited bio-technical foundation, Libya is in the early research and development stage of a biological warfare program. The limitations in Libya's technical ability coupled with difficulties in weaponizing agents may preclude production of a biological weapon for some part of the foreseeable future, despite the current bio-technical revolution occurring in the world.<sup>36</sup>

Libya's nuclear program is rudimentary, with a small research reactor provided by the Soviet Union in the mid-1970s. Libya is attempting to build up its internal resources by sending scientists abroad for training and actively recruiting foreign nuclear scientists and technicians. It is well known that Colonel Qadhafi attempted to acquire a nuclear

weapon even though Libya ratified the Non Proliferation Treaty in 1975.<sup>37</sup> Despite these attempts, Libya's indigenous nuclear program lacks technical expertise and sufficient support from foreign suppliers to make it viable at this time.<sup>38</sup>

Concurrently, Libya has delivery systems which could be used to deliver a variety of warheads, including chemical weapons. Most notably, Libya currently possesses the SCUD-B, with a range of approximately 300 kilometers (see figure 6-2). Libya continues to resource its indigenous missile program.<sup>39</sup>



*Figure 6-2*

(extracted from *Proliferation: Threat and Response*, 28)

## Tarhuna - The Case Applied

We will now apply our previous framework using each decision variable -- military, national and foreign policy, legal, and moral and ethical -- with respect to Tarhunah, Libya. We place ourselves in time back to the spring of 1996, within the Clinton administration, as the question of preemption against Tarhunah was considered. Although we consider preemption options to include non-forceful as well as forceful means, for the sake of our analysis, we consider only the forceful option. Again, we don't intend to make a specific recommendation for or against preemption. What we seek to demonstrate is how our framework works in practice. Accordingly, we look first at the critical intelligence factors as a means of establishing a common thread for analysis of the four variables. We use the key questions derived from our examination of each variable in Chapters 2 through 5 to illuminate the process a decisionmaker might use. Following the variables, we conclude this chapter with a synopsis of insights on the case study and our framework.

### Military and Security Analysis

#### **Intelligence Feasibility**

We first examine Tarhunah using the threat factors we discussed in Chapter 2: history, intention, capability, opportunity, and actions.

*History:* Libya clearly has a history of open animosity and hostile actions against American interests. Libya has used chemical weapons in the past, although not against the U.S.

*Intentions:* As demonstrated by Colonel Qadhafi's recent "call to arms" to incite terrorist actions against the United States, and his declaration that there is no longer "a logic" between the U.S. and Libya, Libya has enduring hostile intentions toward the United States, and likely will continue to have them as long as Qadhafi remains in power. Libya may also intend to provide chemical agents to other parties ultimately to be used against the United States.

*Capability:* Libya physically possesses the means and the weapons necessary to deliver or conduct chemical attacks within the region. In the past, it has attacked Chadian troops with chemical weapons delivered from aircraft. Working with non-state actors, Libya could conduct a terrorist-style attack directly against Americans abroad or even in America.

*Opportunity:* Libya periodically has opportunities to conduct chemical attacks against U.S. navy ships in port in Malta. Libya currently has the opportunity to strike U.S. interests in Egypt and Tunisia. Libya also has the opportunity to provide chemical agents or weapons to other states as well as non-state actors including terrorists.

*Action:* There have been no observed attempts by Libya to conduct a chemical attack on U.S. interests.

If we use a diagrammatic approach as we demonstrated in Chapter 2, the diagram of threat factors might look like that shown in figure 6-3:

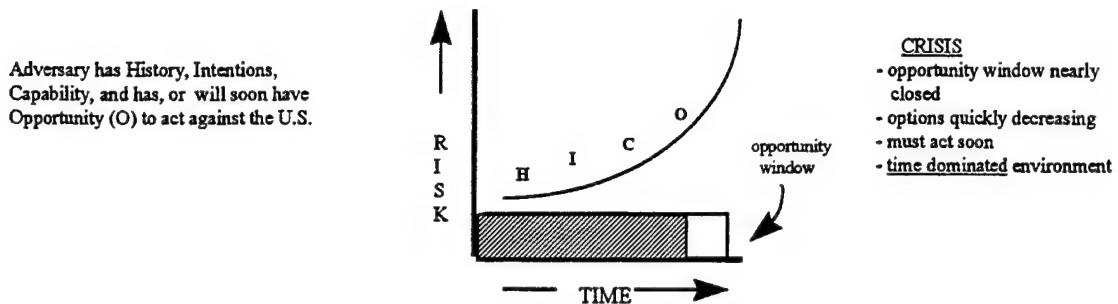


figure 6-3

**Now to the questions:** As we noted above, our intent is to use the key questions derived from our previous examination of each variable in Chapters 2 through 5 to illuminate the process a decisionmaker might use.

**Do we know what the threat is (Is this a WMD, a conventional weapon, info/cyber attack?)** Yes and no. We strongly suspect the current facility is a plant to produce chemical agents, a clear WMD threat. What is not clear is what the Tarhunah plant ultimately threatens among America's interests: is it primarily for weapons to support Qadhafi's ego or Libya's drive for regional hegemony (which might threaten U.S. interests in the area), or could it be more directly aimed at Americans and America, say through state support and supply of chemical agents to terrorists?

**Is the threat against U.S. vital interests?** Possibly. Based on Libya's recent history (fervently anti-American, and the use of chemical agents in conflict) as well as Qadhafi's expressed intentions, there is a strong possibility that the chemical agents to be produced at Tarhunah would be used to threaten our vital interests; however, we are not certain at this time.

**Do we have enough information to identify who (be it a nation, group, or individual) is behind the threat?** Yes, Libya is building the plant. We also know other

third party countries that have provided expertise and material necessary for construction of this chemical weapons factory.

**Can intelligence place the threat in time and location? (Do we know where the capability is?)** Again, yes and no. We know exactly where the facility is, and what it looks like externally. We may have some idea of when it will be operational. What we can't place is when, if ever, the chemical agents produced at Tarhunah will directly threaten U.S. interests.

*Clearly, we must decide if Tarhunah itself represents a direct threat to U.S. interests. For the sake of demonstrating our framework, we will say yes: Tarhunah, if allowed to open, will provide massive amounts of chemical agents to Libya, and could provide chemical agents to non-state actors, both of whom may desire to attack U.S. interests and America.*

### **Military Feasibility (Capability)**

**Is there a clear-cut military mission that could preempt the threat?** Yes: Destroy the production facility at Tarhunah before it begins operation in order to ensure Libya cannot produce chemical agents at the site.

**Do we know what constitutes success? Is success likely?** Yes, success would be destruction of the Libyan capability to produce chemical agents (keeping in mind Libya already possesses some chemical agents from its Rabta production cycle). Is success likely? Not sure at this time.

**Is there an existing --not ad hoc—force (or capability) that has trained (or could be used) to address this type of threat?** Not clear. The media states that we don't have conventional bombs that could penetrate to the facility. Nuclear warheads have

been ruled out. Cruise missiles might collapse part of the structure. There may be Special Operations Forces that could conduct an attack—likely to be risky, if not suicidal.

### **Collateral Damage**

**What collateral damage is likely if preemption succeeds? If it fails? Not certain in either case, but if successful, there likely may be Libyan or other nation casualties among workers--these could be reduced by adjusting attack timing (to a specific non-working day of the week and late at night).**

**Could I justify to a representative group of Americans the probable collateral damage of this preemption? Likely yes, especially if limited to Libyans or third party nationals participating in building or operating the facility.**

### **Timing**

**Is preemption militarily feasible at this time (can it actually be carried out with some likelihood of success)? Not certain given the open-source limitations of our study.**

**Am I satisfied that I could explain the threat, the risk to U.S. interests, and the need to preempt to a representative group of American citizens and they would understand (if not agree)? Yes, most Americans are weary of Qadhafi and Libya. We could explain the threat, as complex as it is, and the risk to America. We may have a harder time convincing them that now is the time to preempt.**

## Multilateral Response

**Is there an international interest in stopping the threat? If so, can documented evidence be provided to the public or like-minded nations to engender support?** As of right now, there is probably not an international interest in stopping Tarhunah--the U.S. might be able to build an interest if it exerts diplomatic and public effort, as well as publicly releases evidence corroborating Libyan intentions and capabilities.

**Is there a specific international or multilateral capability which will boost the chance of success? Can the U.S. use this capability?** Not that we know of.

**If the U.S. goes with a multilateral or international response and the preemption fails, will the political result be worse than the threat motivating the attempt?** Not clear yet.

## Consequences

**Will the preemption we contemplate eliminate the adversary's intent? How? Does it eliminate the adversary, and if so, is that elimination required for conclusive results? Will threats alone be effective?** Given the nature of our analysis, a specific method of preemption will be examined here. For study purposes, let us say we think we might bomb the facility with a newly developed conventional weapon which feasibly could destroy the facility. Qadhafi remains anti-American, probably even more so. His intent to hurt U.S. interests remains, and he may well displace laterally to yet another facility, a city, or even to an third party state; or escalate vertically to biological or nuclear weapons. He may well feel compelled to retaliate (as he has before) to U.S. preemption, causing further

escalation. Successful preemption would buy time before Libya has even more chemical weapons to use or export, but it may not eliminate Libya's current stocks. The threat of preemption, if made by key administration officials such as the President or Secretary of Defense, may be sufficient to alter Qadhafi's program, if only to cause it to change laterally or vertically as described above.

### **National and Foreign Policy Analysis**

#### **Domestic Consensus**

**Is there clear public and congressional consensus about the national interest to be served? Would Ron Dellums and Newt Gingrich agree on it?** Yes. Defense against direct attacks on U.S. citizens and institutions is a Constitutionally mandated raison d'être of the federal government.

**Is the projected military action militarily and bureaucratically feasible? Is all of the necessary support, both foreign and domestic, really onboard, or will a parochial interest block success?** Unknown.

**Are the authorizing parties in the Executive and in the Congress prepared to live with the consequences if the mission fails?** Unclear. Given broad consensus that a vital national interest is at stake and that use of force is the best or only alternative, administration and Congressional leaders will commit U.S. forces and accept the consequences of failure. In the summer of 1996, consensus existed regarding the interest at stake, but significant doubt existed as to whether force was the best alternative.

**If Libya does not comply with accepted norms of behavior in international relations, could preemptive action be taken without violating Libyan sovereignty?**

Yes and no. Yes, if the action could be directed at interdicting critical machinery and precursor chemicals prior to delivery to Libya. No, if the preemption required an attack on the facility at Tarhunah. An attack would not be a violation if authorized by a UN Security Council resolution (UNSCR) which superseded Libya's sovereign right to territorial integrity. The intrusive inspection regime imposed on Iraq by UNSCRs is a recent example of such supersession. At any rate, such a resolution is unlikely without a massive diplomatic effort and extensive release of U.S. "evidence."

**If the international community cannot agree on formal sanctions against Libya, can the U.S. act unilaterally under the doctrine of "self help"?** Yes, but the U.S. must clearly demonstrate that the threat posed by the weapons is intended to be used against U.S. vital interests, which remains difficult at this time. Qadhafi's public statements could form a solid foundation on which to build that argument, but public release of more evidence is at least as important.

**Will the preemptive action being considered undermine long term U.S. interests or erode international support for U.S. policy?** Yes. Egypt, an important player in the region and a U.S. partner in the Middle East has stated that Tarhunah is not a chemical agent production facility. An attack now could undermine long term U.S. goals for peace in the region.

#### **Legal Analysis**

**Is there sufficient factual basis to determine to a reasonable certainty that the threat has achieved or is near to achieving the capability to deploy or employ a weapon or destructive agent/action?** No. Tarhunah, based on imagery and human intelligence, is designed to be the largest underground chemical weapons manufacturing

plant in the world. Evidence indicates, however, that it is not yet near completion.

Ironically, according to our framework, Tarhunah is more vulnerable to preemptive actions now than it will be when it is near completion.

**Is there a reasonable certainty that if not preempted, a weapon or destructive agent will be employed or deployed?** Yes (especially deployed). Libya is one of a few select nations to actually employ the use of chemical warfare in the last ten years. In 1987, Libya using a aircraft, dispersed chemical agents against Chadian troops. Prior to faking the fire at Rabta in 1990, the chemical weapon manufacturing equipment and the already 100 tons of chemical agents were removed to storage bunkers.

This specialized equipment and already produced chemical agent reserve lay the foundation for Tarhunah. In an era when the global community is moving towards a Chemical Weapons Convention, Libya is constructing the largest chemical weapons manufacturing facility. Libya has attempted to hide from international inspection its chemical warfare production capabilities and existing stockpiles of mustard gas and Sarin nerve agent.

**Is there sufficient evidence to determine to a reasonable certainty that Libya's history and rhetoric make it likely that the United States or its vital interests will be a target?** Yes. Colonel Qadhafi as the Libyan leader has a long history of supporting Arab terrorist groups. In 1984, the Abu Nidal organization moved their headquarters to Libya. The Abu Nidal terrorist organization has been responsible for numerous terrorist acts against Americans. In 1986, Libya fired six missiles at United States Navy aircraft operating in international airspace in the Gulf of Sidra. Later in 1986,

Libya was involved in the bombing of a West German discotheque where two Americans were killed and fifty to sixty Americans were injured.

In response to the American air strike on Libya in April 1986, Libya launched two SCUD missiles at a U.S. Coast Guard communications installation in the Mediterranean.

Today Libya harbors the two terrorists who have been accused of the bombing of Pan Am Flight 103 over Lockerbie, Scotland.

Colonel Qadhafi's rhetoric includes statements such as: "we are capable of exporting terrorism to the heart of America"; "we have the right to fight America, and we have the right to export terrorism to them"; and "there is no longer any logic between us [Libya and the USA], no common denominator or rationality. We are looking for ways to frighten America so that it retreats."

The history of Colonel Qadhafi's rhetoric coupled with his actions clearly indicate an anti-American posture that has in the past and can in the future jeopardize our national security. The key problem remains to determine if Qadhafi would move towards actually seeking opportunity to act.

**Are planned preemptive actions reasonable and proportional to the threat posed? Is consideration given to collateral damage concerns?** Difficult to answer without a clear and highly specific preemption option to analyze.

#### **Moral and Ethical Analysis**

**Can the preemption action under consideration be directly associated with or related to a clear and unmistakable statement of national interest?** Yes. The U.S.

clearly is on record with statements of national interest and purpose concerning WMD.

The following is from the U.S. "National Security Strategy" document of February 1996:

"Weapons of mass destruction--nuclear, biological, and chemical--along with their associated delivery systems, pose a major threat to our security and that of our allies and other friendly nations."<sup>40</sup>

"A critical priority for the United States is to stem the proliferation of nuclear, biological and chemical weapons and their delivery systems."<sup>41</sup>

**Can the moral tradeoffs be clearly articulated in a risk-versus-benefit explanation, i.e., will the moral consequences of not preempting appear worse than those associated with preempting? Yes.** With careful detailing and explanation of Libya's history regarding chemical weapons construction and use, and supporting documentation and explanation of Libya's persistent refusal to act in accordance with international norms, this question can be answered in a way which supports ethical justification of preemption.

**Is the decision to preempt the last possible reasonable option for defense of U.S. vital interests without incurring untenable risk, and can it be justified in those terms? No.** Given what happened at Rabta, this is probably the last opportunity to preempt without significant military risk, but preemption probably cannot be justified in only those terms.

#### **Case Study Conclusions**

Application of our decision framework to the Tarhunah case leads to our conclusion that decisionmakers would elect **not** to use military force to preempt Tarhunah's construction. Why is this so?

First, from the military analysis (and in the time frame of the case study) it is likely that the opportunity window for destruction of Tarhunah using non-nuclear weapons has passed, and the military risk to any known U.S. military force is prohibitively high. With this realization, U.S. military planners could design new weapons or capabilities which might make the military option more feasible in the near future, thus eliminating this consideration as a prohibitive one.

Second, from the political aspect, Qadhafi's standing guarantees to Egyptian President Mubarak that Tarhunah is not a chemical facility -- whether true or false -- and Mubarak's subsequent warnings against any U.S. military action present significant obstacles to U.S. action. There is now less apparent rationale for immediate action, and acting against Tarhuna might also jeopardize a key regional relationship. Any action against Tarhunah subsequent to Mubarak's assessment without the unlikely consent of Mubarak might well result in wide and severely adverse diplomatic consequences.

Third, from the legal analysis it is clear that the primary problem represented by the Tarhunah facility is not the potential existence and possession of chemical weapons by Libya -- after all, Libya already has an inventory of 100 tons of nerve and mustard gas produced at Rabta -- but rather the prospect that Tarhunah, when completed, would enable continuous manufacture and stockpile of large volumes of chemical agents. This means that a strike against Tarhunah might successfully destroy the facility, but Libya would still possess chemical agents. It is difficult then to legally demonstrate that the mere existence and operation of Tarhunah represents a threat greater than that which already exists, such that we could justify preemption.

Finally, from a moral standpoint, it would be difficult to represent this action purely as an act of self defense for reasons cited in the legal analysis above. Consequently international moral justification would be problematic in the least.

### **Observations About Our Framework**

A systematic and orderly framework allows consistency, disciplined thinking, purposeful direction, and overall helps separate emotion from logical process. Clearly even when guided by an orderly decision framework such as the one we offer here, however, the decision process is difficult. The framework does not make the decision, nor does it provide the decisionmaker a recipe for a decision; its value lies in its usefulness as a tool to disaggregate multiple interrelated complex issues to permit sequential focus on, and temporal prioritization of the most important issues.

It is probably true of all complex policy questions that few decisions about them are drawn from a single factor, but rather are derived on the combined consideration of several factors. We found this to be true here. We also remained acutely aware while working the framework that good intelligence is critical. Without specifically knowing Libyan intentions for example, we must infer them from the evidence of Libyan actions, available statements, and historical performance. The more we use inference or assumption in our analytical calculus, the greater the danger of miscalculation. The risk of miscalculation presents danger for both sides. When risk is high, we may feel pressed to act even with admittedly poor intelligence, because to choose not to act may expose America and Americans to a risk too great to accept. The lesson is that we must first be

sure what intelligence does and doesn't tell us, and be certain about what it means before we apply the four variables.

*The Tarhunah case study points out the difficulties associated with decisionmaking on preemption. If we knew what the adversary was thinking, it would be more clear. Time may bring clarity, but it may also squander precious moments when the adversary is still vulnerable, and America less so.*

In our final chapter we conclude with key findings from each of the variables and present our summary judgments.

## Chapter 6 Endnotes

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- <sup>19</sup> Douglas Waller, "Target Gaddafi, Again." *Time* 1 Apr. 1996, 46.
- <sup>20</sup> Waller 46.
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- <sup>26</sup> Rosenthal B7
- <sup>27</sup> Art Pine, "U.S. Hints It Would Bomb Libyan Weapons Facility" *Los Angeles Times* 12 Apr. 1996, 4
- <sup>28</sup> Art Pine, "Only A-Bomb Could Destroy Libya Plant, Scientist Says; Pentagon: Expert Declares Ordinary Weapons Incapable of Carrying Out U.S. Threat to Hit Suspected Chemical Arms Facility" *Los Angeles Times* 24 Apr. 1996 7.
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- <sup>31</sup> Carol Giacomo, "U.S. Insists Libya is Building Chemical Arms Plant" *Reuters North American Wire*, 30 May 1996
- <sup>32</sup> Giacomo.
- <sup>33</sup> Lancaster A25.
- <sup>34</sup> "Libya - Egypt Warned U.S. Against Attacking Tarhunah" *Periscope Daily Defense News* 19 Aug. 1996.

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- <sup>35</sup> Colonel Qaddafi, CNN Interview, Transcript# 139-1, April 15, 1996
- <sup>36</sup> *Proliferation: Threat and Response*, 27.
- <sup>37</sup> *Proliferation: Threat and Response* 25.
- <sup>38</sup> *Proliferation: Threat and Response* 25.
- <sup>39</sup> *Proliferation: Threat and Response* 27.
- <sup>40</sup> The White House, *A National Security Strategy of Engagement and Enlargement* ( Washington: Government Printing Office, 1966) 19.
- <sup>41</sup> The White House 19.

## Key Findings and Judgments

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The Tarhunah Case Study demonstrates decisionmaking difficulties regarding preemption. Following our examination of this particular case study as well as others we have thought of but not written about, we can summarize our findings with several key judgments concerning contemporary use of military preemption.

As we explicitly stated when we began, we seek neither a checklist for assured success nor a recipe for action. Our judgments must be understood in that light. Our intent is to move preemption into the current debate, and having done so, provide for a systematic, analytical decisionmaking process where preemption is one of the tools available to policy makers. We strongly believe any decision to preempt will be made with specific regard to unique circumstances, and that asking the questions we have posed in our examination will focus analysis on relevant issues and aspects. In fact, our judgments are exactly those issues or aspects concerning preemption that we judge to have predominate importance to decisionmakers.

## **KEY FINDINGS**

### **Military Issues**

In preemption, decisionmakers face a dilemma: often the most feasible time militarily to preempt is early, before a threatening capability has been weaponized or positioned. At this stage, however, it is often most difficult to justify, and so is far less feasible ethically, legally, and politically. Once a threatening action is imminent, however, preemption is far easier to justify, but is often militarily much more difficult to accomplish. Decisionmakers must decide whether to act, and then how, as early as politically possible.

Preemption can be a powerful deterrent. An ambiguous policy may be as effective as a declaratory policy, because adversaries pay less attention to what we publicly say and far more attention to what they believe we will do. Threatened preemption may also be effective, especially following a previously successful preemption operation.

The capability to detect and act effectively will often depend on civil agencies and law enforcement working hand-in-hand with the military. The threatening capability could be a terrorist group armed with a rogue state-supplied weapon built with fissile (or chemical or biological) material bought or stolen from a nation-state by a transnational crime organization. Effective and efficient preemptive action may require legislative action to support an optimum force mix and capability.

### **National and Foreign Policy Issues**

The federal government has a constitutional duty to defend U.S. citizens and vital institutions against attack by enemies, foreign or domestic. U.S. policy which includes

preemption as an option may stimulate strong opposition both nationally and internationally, if those responsible do not act now to develop plans, policies and procedures to address the inevitable threats to our security. Public debate which illuminates the threat, delineates the narrow scope of anticipated actions and establishes a political-military framework for decisionmaking will reduce opposition based on false premises and lay the groundwork for justifying action taken. A well-constructed framework also will reduce the possibility of inappropriate or unwarranted use of force when other effective means are available.

In the international arena, nations will not be sanguine about U.S. action which infringes on the rights or territory of another sovereign; however, use of force may be the only option in situations where the usual tools of the rationalist diplomat are ineffective. We do not advocate a strictly realist foreign policy, but specific circumstances may require the U.S. to forego exploration of every diplomatic avenue. The diplomatic tools which have served the U.S. well since World War II may be ineffective in deterring these unconventional threats to our security. When preemption is contemplated, the concerns of allies, friendly regional states and potential adversaries must be considered and steps should be taken to ameliorate any negative impact. As we made clear earlier, we think preemption will be rare, and should always be narrowly focused. Too frequent use would almost certainly erode international support for U.S. policy and also could encourage additional attacks on U.S. vital interests.

In summary, neither national nor foreign political considerations should preclude preemptive action where a clear threat exists and a reasonable course of action can eliminate or deter the threat.

## **Legal Issues**

Depending on specific circumstances, preemption may be legal under current international legal theory and the United Nations Charter. The authors of United Nations Article 51 could not have anticipated contemporary threats, nor could it have foreseen the role of non-state actors. Customary international law fails to account completely for circumstances which may arise today. The United States, as the “indispensable” nation, must take the lead in advancing customary law and updating applicable international treaties such as the United Nations Charter, to make them more relevant to challenges faced by nations today. Specifically, these documents must more fully address “proportionality” and “reasonableness” which may arise in circumstances where it is not feasible to use force only as a last resort.

## **Moral and Ethical Issues**

Although the decision to preempt probably would not hinge primarily on its ethical attributes, the consequences of the aftermath certainly will give rise to ethical and moral judgment. Preemption can be ethically and morally defensible. Politicians will be required to provide and articulate the defense.

The effective ethical justification of a particular preemptive policy likely will not hinge on whether the actions stemming from that policy constitute proper ethical behavior, but whether internationally the justifying ethical argument successfully satisfies legal stipulations for self defense, and domestically on concise articulation of the risks posed by the threat versus the consequences of not acting. Sufficient and acceptable ethical

justification of preemption will depend on how well supporting explanations clearly flow from consistent domestic and international understanding of national purpose coupled to, and flowing from, national interest.

### **Summary Judgments**

Specific, accurate, and timely intelligence is a critical precursor--an enabler and a catalyst--for preemption. Intelligence sharing with non-traditional domestic and international partners may be necessary to achieve the sufficient evidence for justification necessary for timely and feasible preemption. Intelligence assets must focus on capabilities and intentions of potential adversaries, and on their opportunity to carry out intentions. The convergence in time and space of an adversary's capability, intention, past history, opportunity and current actions are key to the decision to preempt. These five critical intelligence insights bear directly and decisively on the key decision variables. Without these, the possibilities for moral and legal justification, as well as political and military feasibility, are tenuous.

A deliberately ambiguous policy that neither rejects nor recommends preemption may be best. To our potential opponents, what we do is far more important than what we say. For the American public and the rest of the world, what we say is important.

Preemption may have significant deterrence value, especially after a rogue or terrorist has once been preempted. It may, however, drive a determined adversary to extreme measures of retaliation and reprisal. These consequences could be worse than the original threat that was preempted.

Paradoxically, while preemptive actions may eliminate immediate threats, they may also cause the adversary to go underground, figuratively and literally, thereby masking future activities from detection, and making future interdictive efforts much more difficult. The impact of this "preemption paradox" is that decisionmakers must have a clear understanding of their objectives, and of what constitutes success: in some cases, preemption serves only to delay or prolong crisis, in favor of "buying time" to seek alternative solutions.

The proliferation of weapons of mass destruction, high yield conventional explosives and information warfare technology will increasingly threaten American lives, national security and economic institutions. The scale of destructive potential which these threats engender will not permit a continuing policy based on wishful diplomacy and after-the-fact reprisals. U.S. leaders must consider preemption as a viable, sometimes necessary option to prevent unacceptable loss of life or damage to essential institutions.

In the end, America must act in its citizen's own interests -- the national interest. Current legal and political prescriptions often conflict with the national interest and are inadequate in today's environment. American policy cannot be held hostage to an absolute moral or legal geometry. That said, our actions will be judged in light of some moral and legal consensus. The U.S. must take the lead to remove the existing inadequacies and build a common consensus for moral and legal behavior in today's world.

In the international arena as well as domestically, the nation's leaders will be called upon to defend their actions, intentions, and the consequences thereof. Policymakers are accountable to those they serve to act on their best behalf, even if those actions may be deeply controversial. If there are obstacles to adequate defense of those positions, then

leaders should take action now to eliminate them. One likely obstacle to these factors is lack of consensus, be it international or domestic. The path to gaining consensus starts with a systematic, purposeful, and open debate.

## APPENDIX 1: ISSUE HISTORY

The following brief issue history includes preemptive actions and plans *for* action during and since WWII. What characteristics do they all seem to share?

First, and perhaps most importantly, it is apparent that these preemptive actions were triggered by perceptions that a threatening situation constituting unacceptable risk was developing, and that the situation was time-dominated. That is, there was a relatively narrow window of opportunity for action to reduce or eliminate the immediate risk, and actions beyond that window would, for a variety of reasons, be unfeasible. Second, most (but not all) of the historical examples occurred within the context of a larger armed conflict. Third, in every example, destructive military force was the means for risk reduction. Finally, each case represents preemption as a nuclear counter-proliferation measure.

Case - Nazi A-Bomb Blocked: Allied efforts to deny Hitler the atomic bomb were successful when a Norwegian saboteur sunk a ferry carrying most of the German heavy water. Allied air attacks on German nuclear laboratories also hampered their progress.

Outcome - First nuclear counter-proliferation operation in history successfully dashed German plans and preparations to construct an atom bomb.

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Case- Tokyo Case Atomic Labs Destroyed: U.S. bombings of Tokyo destroyed the most advanced Japanese weapons research laboratory on April 13, 1945.

Outcome - Allied bombs destroyed Japan's cyclotron on Friday the 13th of April, 1945, terminating Japan's most advanced nuclear research project.

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Case - Osirak I: Iranians launched an unsuccessful attack on the Iraqi Osirak reactor, September 30, 1980 in the Iran-Iraq War.

Outcome - Reactor was only partially damaged and was up-and-running a short time later.

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Case - Osirak II: On June 7, 1981, Israel initiated an air attack on the same Iraqi Osirak reactor, destroying it.

Outcome - Reactor destroyed delaying Iraqi attempts to build a nuclear weapon.

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Case - Kahuta Attack Plan: Israeli interest in destroying Pakistan Kahuta reactor to scuttle the "Islamic bomb" was blocked by India's refusal to grant landing and refueling rights to Israeli warplanes in 1982.

Outcome - No effect

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Case - Bushehr: Attacks on Iranian Reactor: Iraq launched seven air attacks on the Iranian nuclear reactor at Bushehr between 1984 and 1988 during the Iran-Iraq War, ultimately destroying the facility.

Outcome - Destroyed most of the known Iranian capability to produce special nuclear materials.

<sup>1</sup> Barry Schneider, *Radical Responses to Radical Regimes: Evaluating Preemptive Counter-Proliferation*, (Washington: National Defense University, McNair Paper 41, 1995) 8-19.

## **APPENDIX 2: QUESTIONS FOR DECISIONMAKERS**

The questions below provide a structured approach for decisionmakers to analyze specific situations and threats to determine the advisability of preemption. As we note earlier in our study, we acknowledge non-forceful means of preemption, but focus our study and our questions primarily on the preemptive use of force.

- Do we know what the threat is (is this a WMD, a conventional weapon, info/cyber attack?)
- Is the threat against U.S. vital interests?
- Do we have enough information to identify who -- be it a nation, group, or individual -- is behind the threat?
- Do we know where the threat is?
- Is there a clear-cut military mission that could preempt the threat?
- Do we know what constitutes success? Is success likely?
- Is there an existing -- not ad hoc -- force that has trained to address this type of threat?
- Is preemption militarily feasible at this time (can it actually be carried out with some likelihood of success)?
- At this stage could I explain the threat, the risk to U.S. interests, and the need to preempt to a representative group of American citizens and they would understand (if not agree)?
- What collateral damage is likely if preemption succeeds? What if it fails?

- Can the anticipated collateral damage be justified in comparison to the threat?
- Could I justify to a representative group of Americans the probable collateral damage of this preemption?
- Is there an international interest in stopping the threat? If so, can documented evidence be provided to the public or like-minded nations to engender support?
- Is there a specific international or multilateral capability which will boost the chance of success? Can the U.S. use this capability?
- If the U.S. goes with a multilateral or international response and the preemption fails, will the result be worse than the threat motivating the initial attempt?
- Will the preemption we contemplate eliminate the adversary's intent? Does it eliminate the adversary, and if so, is that elimination required for conclusive results?
- What options are available if preemption fails against a WMD threat?
- Will the threat of preemption likely accomplish our objective?
- Is a successful preemption likely to result in the adversary displacing laterally, say underground or to another state, or escalating vertically, say to a different form of capability? Is this result worse than the original threat?
- Is there clear public and congressional consensus about the national interest to be served?
- Is the projected action militarily and bureaucratically feasible? Is all of the necessary support, both foreign and domestic really onboard or will a parochial interest block success?
- Are the authorizing parties in the Executive and in Congress prepared to live with the consequences if the mission fails?

- Is there any reasonable expectation that diplomacy can achieve the desired end?
- Will the preemptive action being considered undermine long term U.S. interests or erode international support for U.S. policy?
- Is there sufficient factual basis to determine to a reasonable certainty that the threat has achieved or is near to achieving the capability to deploy or employ a weapon or destructive agent/action?
- Are there indications of reasonable certainty that if not preempted, a weapon or destructive agent will be employed or deployed?
- Is there sufficient evidence to determine to a reasonable certainty that the threat's history and rhetoric make it likely that the U.S. or its vital interests will be a target?
- Are planned preemption actions reasonable and proportional to the threat posed?
- Can the preemption under consideration be directly associated with or related to a clear and unmistakable statement of national interest?
- Can the moral tradeoffs be clearly articulated in a risk-versus-benefit explanation, i.e., will the moral consequences of not preempting appear worse than those associated with preempting?
- Is the decision to preempt the last possible reasonable option for defense of U.S. interests without incurring untenable risk, and can it be justified in those terms?

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